


# WELFARE BENEFITS AS PROPERTY INTERESTS: A CONSTITUTIONAL RIGHT TO A HEARING AND JUDICIAL REVIEW

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## INTRODUCTION

It is by no means novel to state that notions of property have been and will be subject to change.[1] "Property" is not a technical legal term with a definitely resolved static meaning; in the words of the German jurist Otto von Gierke, it is a "historical, and not a logical category."[2] Indeed, any cursory glance at the historical developments

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[1] "While 'property rights' under American law enjoy a reputation for permanence, they are in fact more highly relative and more sensitive to changing economic factors and social opinions than most other legal concepts." R. NETHERTON, CONTROL OF HIGHWAY ACCESS 80 (1963), *quoted in* J. CRIBBET, W. FRITZ & C. JOHNSON, PROPERTY xvii (3d ed. 1972). The historical aspect of property is also stressed in Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691 (1938); 1 R. POWELL, THE LAW OF REAL PROPERTY 73 (1949). The interdependence of the concept of property with general aspects of government and social values is emphasized in Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954).

[2] BINDINGS SYSTEMATISCHES HANDBUCH DER DEUTSCHEN RECHTSWISSENSCHAFT, 2. Abt., 3. TEIL: O. VON GIERKE, DEUTSCHES PRIVATRECHT. 2. BAND: SACHENRECHT 348 (1905).

of property law confirms this view. For example, one of the most dramatic developments in legal history was the gradual disappearance of the feudal obligations linked to property in the Middle Ages.[3] However, in the past decades, we have witnessed a reverse trend: recent legislative changes in tax law, in the landlord-tenant area, in zoning law, and in the environmental sphere clearly point to a more socially oriented notion of property.

But this new relationship between individual property and social needs has led to more than a reduction of individual property rights. Society's increased role has also entailed the formation of new rights of the individual against the state which, at least in some respects, are functional equivalents to traditional property rights. Legally, this expansion of property notions occurred considerably later than the gradual reduction of traditional property rights. For it was only in 1970, in *Goldberg v. Kelly*,[4] that the Supreme Court equated for the first time an individual welfare right against the state with a traditional property right.[5] In proper judicial fashion, this acknowledgment was cautiously limited to the specific facts of the case, i.e., to the constitutional parameters of the hearing right.[6]

But, of course, the question of the "property status" of individual entitlements against the state is not limited to the simple "hearing right."[7] found in *Goldberg*. Justice Black was right to point out in his *Goldberg* dissent that the legal recognition of a "property status" for traditionally non-property interests in one area will necessarily spill over into

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[3]G. CHESHIRE, THE MODERN LAW OF REAL PROPERTY 9 (6th ed. 1949).

[4]"It may be more realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' Much of the existing wealth in this country takes the form of rights which do not fall within traditional common law concepts of property." Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970).

[5]The literature on the social function of welfare rights is discussed in Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 774 n. 11 (1974) [hereinafter cited as Mashaw].

[6]In Graham v. Richardson, 403 U.S. 365, 374 (1971), the Court noted in dictum that constitutional rights no longer turn upon a "right" or a "privilege" classification.

[7]It would be worthwhile for some future study to analyze the interconnections between the right of standing and the right to a hearing as well as the right to judicial review. Such a study might well demonstrate that the recent constitutional developments in these three areas are the result of a mutual influence and thus would provide further evidence of common doctrinal and functional roots. As to the relationship between standing and the hearing right, see Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1723 (1975) [hereinafter cited as Stewart]. For connecting elements between standing and the right to judicial review, see *id.* at 1726–27 n. 285; K. DAVIS, ADMINISTRATIVE LAW TREATISE 95 (Supp. 1970) [hereinafter cited as K. DAVIS]. *See also* Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest in Balancing*, 88 HARV. L. REV. 1510, 1529 n. 80 (1975).

other legal fields.[8] Although the *Goldberg* ruling has been narrowed by decisions of the Burger Court,[9] *Goldberg* is good law today.[10] Yet Justice Black's prognosis has thus far found no support in the development of the law subsequent to the Goldberg decision. Neither the courts nor the commentators have so far asked the relevant broader questions beyond the hearing right area.

This article intends to explore the property status of individual welfare entitlements against the state in an area where it has received virtually no attention: the sphere of the constitutional right to judicial review.[11] Although it has been by and large resolved that there is a

[8]The Court apparently feels that this decision will benefit the poor and needy. In my judgment the eventual result will be just the opposite. While today's decision requires only an administrative, evidentiary hearing, the inevitable logic of the approach taken will lead to constitutionally imposed, time-consuming delays of a full adversary process of administrative and judicial review. In the next case the welfare recipients are bound to argue that cutting off benefits before judicial review of the agency's decision is also a denial of due process. Since, by hypothesis, termination of aid at that point may still 'deprive an eligible recipient of the very means by which to live while he waits,' ante at 264, I would be surprised if the weighing process did not compel the conclusion that termination without full judicial review would be unconscionable. Goldberg v. Kelly, 397 U.S. 254, 278 (1970) (Black, J. dissenting).

[9]*See* Brudno, *Fairness and Bureaucracy: The Demise of Procedural Due Process for Welfare Claimants*, 25 HASTINGS L. J. 813 (1974). More recently, the tendency for a restrictive interpretation of due process is illustrated by: Paul v. Davis, 424 U.S. 693 (1976) (no hearing right if governmental action does harm to an individual's reputation but does not injure any constitutional right specifically granted); Bishop v. Wood, 96 S. Ct. 2074 (1976) (no pre-termination hearing right for a policeman holding his position at the will of the city); Arnett v. Kennedy, 416 U.S. 134 (1974) (no pre-termination hearing right for a federal employee).

[10]*See* Mathews v. Eldridge, 424 U.S. 319 (1976).

[11]Administrative Procedure Act § 10, 5 U.S.C. § 701(a)(1) (1966) [hereinafter cited as A.P.A.] refers to statutes which preclude judicial review; of course, this does not answer the question of the constitutionality of such statutes under modern standards. *See also* K. DAVIS, *supra* note 7, at 945.

In 1958, Harry W. Jones, concerned with the role of law in the welfare state, wrote "discriminating techniques of judicial review are among the tools of control well along in the course of development." Jones, *The Rule of Law and the Welfare State,* 58 COL. L. REV. 143 (1958). Five years later, Fred Davis wrote that the problem "cries for reform," Davis, *Veteran's Benefits, Judicial Review, and the Constitutional Problems of "Positive" Government*, 39 IND. L. J. 183 (1964). The Davis article was written before *Goldberg* and Roth v. Board of Regents, 408 U.S. 564 (1972) and therefore had to rely on different arguments than the present study, but the results reached are similar. *See also* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 371, n. 260 (1965) [hereinafter cited as JAFFE]. After *Goldberg*, the problem was stated, but not dealt with, in Note, *Reviewability: Statutory Limitations on the Availability of Judicial Review*, 1973 DUKE L. J. 253, 262 n. 47. Stewart generally discusses problems related to the protection of the new property and concludes: "The obvious solution is the extension of the traditional model to protect these additional classes of private interests." Stewart, *supra* note 7, at 1682. *See also*

constitutional right to judicial review when traditional property rights are allegedly infringed upon by governmental action,[12] this treatment has thus far not been applied to nontraditional "property" rights.

From a practical viewpoint, this may be understandable inasmuch as Congress and the state legislatures have granted a statutory right to judicial review in many areas of nontraditional property rights.[13] But there remain spectacular gaps in other areas: for example, no right of judicial review exists for recipients of veterans' benefits.[14] Furthermore, there is the question of whether Congress can, if it wishes to do so in the future, repeal those statutory provisions in which it has already granted a right of statutory judicial review.

Traditionally, two methods have been used to bar judicial review in the area of welfare rights. For several decades, the courts distinguished "privileges" from "rights," thereby denying a constitutional right to judicial review for those claims which did not fall into the "rights" category.[15] In addition, the federal and state legislatures have enacted so-called finality clauses which purport to bar judicial review by stating that the administrative decision is final.[16]

More recently, however, the courts have become reluctant to deny judicial review. For all practical purposes, the traditional right-privilege dichotomy has been abandoned, and the courts have gradually established a presumption in favor of the reviewability of administrative actions.[17] According to the present view, this presumption is set aside only in the light of a clear legislative direction against the reviewability of a specific administrative action, or if the administrative dis-

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Michelman, *Formal and Associational Aims to Due Process*, in NOMOS XI, DUE PROCESS (J. Pennock ed., forthcoming) [hereinafter cited as Michelman].

[12]*See infra* text accompanying notes 123–140.

[13]For a survey of traditional no-review statutes, see Note, *Judicial Review of Federal Administrative Decisions Concerning Gratuities*, 49 VA. L. REV. 313 (1963); JAFFE, *supra* note 11, at 353–56. As to the development of judicial review in immigration matters, from total administrative discretion to a regime of law, see JAFFE, *supra* note 11, at 340; Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229, 230 (1973); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1390 (1953) [hereinafter cited as Hart]. For a discussion of the limitation of judicial review by the "Clean Air" amendments of 1970 and the Federal Water Pollution Control Act, see Note, *Reviewability: Statutory Limitations on the Availability of Judicial Review*, 1973 DUKE L. J. 253, 263.

[14]*See infra* text accompanying notes 19–23.

[15]For a survey of traditional cases, see DAVIS, *supra* note 7, *passim*.

[16]*See supra* note 12.

[17]Abbott Labs. v. Gardner, 387 U.S. 136 (1967); Barlow v. Collins, 397 U.S. 159, 166 (1970); Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970). As to the historical development, see JAFFE, *supra* note 11, at 339.

cretion involved is of such a nature that judicial review would serve no meaningful purpose.[18]

As to present judicial acceptance of congressional finality clauses, however, one can no longer be sure. Two related cases of recent years appear to indicate that courts become highly reluctant to accept the validity of finality clauses.

In *Tracy v. Gleason*,[19] a veteran's benefit case, the Court of Appeals for the District of Columbia interpreted a statute which made final the Administrator's decision on "any question of law or fact considering a claim.[20] The Court, by a novel approach distinguishing between an original claim and a challenge of a termination of benefits, found that the finality clause could not be applied in the latter case. Three years later, however, Congress amended the law to make the Administrator's decision "final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."[21]

In *Johnson v. Robison*,[22] the Supreme Court construed this law as amended. A conscientious objector had filed a suit seeking a declaratory judgment to declare unconstitutional the granting of educational assistance solely to veterans, thereby excluding conscientious objectors. The Administrator moved to dismiss the action on the ground of the amended law's finality clause. The Court denied this motion, though explicitly leaving open the question of the constitutionality of a statute barring federal courts from reviewing the constitutionality of veteran's benefits legislation. The Court noted, however, that such a statute would raise "serious questions."[23] Thus, in spite of the clear wording of the statute, and in spite of the legislative history of the 1970 amendment, which was explicitly discussed in the case,[24] the Court insisted upon construing the statute in a way that distinguished the proper application of the law by the Administrator from the constitutionality of the statute. Moreover, the Court concluded that the Congress had not intended to preclude a review of constitutionality.

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18 *See, e.g.*, Hahn v. Gottlieb, 430 F.2d 1243 (1st Cir. 1970).
19 379 F.2d 469 (D.C. Cir. 1967).
20 38 U.S.C. § 211(a) (Supp. I 1970).
21 Act of August 12, 1970, Pub. L. No. 91–376, § 8(a), 84 Stat. 790.
22 415 U.S. 361 (1974).
23 415 U.S. at 364.
24 The Court found that a legislative history of former no-review clauses is "almost non-existent." *Id.* at 369.

These two cases illustrate how doubtful the constitutional validity of congressional finality clauses has become, and how far the Supreme Court has progressed in the past decade toward a constitutional right to judicial review of welfare claim determinations. This article attempts to show which questions must be asked before such a constitutional right is formally recognized. Ultimately, it will be argued here that finality clauses in the welfare area must be set aside for the same constitutional reasons that the Court set forth in the seminal case of *Goldberg v. Kelly*.[25]

A note on the method of inquiry used in this study is in order. The legitimacy and desirability of a constitutional claim to judicial review in welfare matters will of course depend upon an analysis dealing with both property notions in the light of modern socio-economic conditions and with the institutional ramifications of a constitutional right to judicial review in welfare matters. But it seems equally appropriate to approach this issue on the basis of the traditional legal technique of following and distinguishing former cases. Building upon the *Goldberg* case, in which the Supreme Court equated welfare claims with traditional property rights, this article will utilize the method of "comparative legal logic" to examine the exact nature of welfare benefits as property interests.

Specifically, our comparative approach will first establish the broad conceptual framework within which welfare benefits may be incorporated into expanding property notions (Part I). Thereafter, we turn to the area of hearing rights, in which the Supreme Court has so far accepted the analogy between property rights and welfare claims (Part II). There will be a particular focus on the general social considerations behind the Court's acceptance of the property status of welfare claims in *Goldberg*.

To reach a basis for the legitimacy of a parallel argument between the hearing right and the right to judicial review, we shall then search for the basic functions of the two mechanisms, setting forth their functional similarities and differences (Part III). For this purpose, we must also examine the existing parallels in the constitutional bases of these rights (Part IV). After these discussions it will be attempted, on the basis of our initial property discussion, to draw our previous observations together and finally establish a constitutional comparative logic supporting the constitutional right to judicial review in welfare matters (Part V). Finally, after a brief discussion of the practical implica-

[25]397 U.S. 254 (1970).

tions of such a constitutional right (Part VI), we shall ask what scope of judicial review is appropriate under our established scheme (Part VII).

## I. THE DIMENSIONS OF THE "NEW PROPERTY": AN ABSTRACT EVALUATION

The broader concept of the "new property" shall be discussed here, as it forms the basis upon which the later policy considerations concerning the constitutional right to judicial review will be built.

The lowest common denominator of most Western jurisprudential thinking on the general concept and essence of "property" is that: 1) there is no absolute, unchangeable concept of property[26] and 2) the basic social function of property is to secure to its owner a sphere of personal freedom into which the government cannot venture except under certain defined conditions.[27] Under earlier laws, it would have been pointless to attribute "property" status to positive rights which the government conferred, against itself, on individuals. Indeed, very few such rights were found.

Moreover, traditional emphasis on education in matters of private—rather than public—law, fostered by nineteenth century libertarian notions, has played a major part in the traditional view of property as only tangible things, "movables" and "immovables."[28] Payments made by the government to an individual, such as welfare payments, hardly fit into such a conceptual scheme.[29]

But with the passing of the state which accepted no other task than to regulate society's need for the protection of liberty and property, the foundation for this scheme eroded.[30] The advent of more expansive forms of government (which not only protected their citizens but also

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[26]For some modern definitions of "property," see C. DONAHUE, T. KAUPER & P. MARTIN, CASES AND MATERIALS ON PROPERTY ch. 11 (1974).

[27]The close relationship between property and individual liberty has often been stressed, *see, e.g.*, Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 230 (1955); Pound, *The Law of Property and Recent Juristic Thought*, 25 A.B.A.J. 993, 996 (1939).

[28]*See* Cohan, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1927); as to the dissolution of boundaries between private and public law, see Stewart, *supra* note 7, at 1700.

[29]*See* Subrin & Dykstra, *Notice and the Right to be Heard: The Significance of Old Friends*, 9 HARV. CIV. R.—CIV. L. REV. 449, 475 (1974) [hereinafter cited as Subrin & Dykstra]: "The time is ripe for the Court to recognize intangible expectancies because most people's property interests are no longer weighed in troy ounces or measured acres."

[30]Stewart, *supra* note 7, at 1681–82.

regulated markets and, on a limited scale, redistributed money for socially acceptable purposes) changed the horizon of expectations around which men centered their lives. Charles Reich demonstrated a dozen years ago in his classic article on "the new property," the modern significance of these expectations with regard to the government's actions, e.g., its tax policy, its license policy, and so on.[31]

As to government benefits, it is fair to assume that behind all rights to such benefits there lies a legislative determination that the recipients deserve support either because they are not in a position to live on a socially acceptable level without welfare benefits, or because their sacrifices for society, e.g., in the military service, gives them a legitimate demand for some reciprocal social response to balance these sacrifices by subsequently granted advantages designed to meet their specific needs. Benefits such as these would not be granted in the absence of a widespread feeling that society "owes" such benefits.

The political aim behind Reich's essay is simple: to guard the original function of property—individual freedom—by applying the rules developed for traditional forms of property to more modern kinds of property.[32] In Reich's view, the application of the full panoply of traditional property rules to more modern forms of property is desirable. But questions arise as to how realistic such a rigid application is in the context of most modern governments. One may wonder, indeed, whether Reich's appeal lies in his rather nostalgic view of the old system of property.

Such an uncompromising application of old property rules would seem to push government out of the more expansive role which it has assumed in recent times. If, for example, one agrees that government—and not the free market—should regulate the licenses for television stations, it would seem almost paradoxical to deny government the power to prescribe to the grantees certain standards which are minimal for an ordered, socially meaningful exercise of the power granted. A parallel to the doctrine of "state action" emerges here. The reasons behind that doctrine in the field of the fourteenth amendment are largely identical to those which call for governmental standards in licensing television stations: once society assumes a certain regulative role toward individ-

[31]Reich, *The New Property*, 73 YALE L. J. 733 (1964). Reich presented the first extensive analysis reaching these conclusions. The basic substance of the idea was already noted before 1964; see, for example, Jones, *The Rule of Law and the Welfare State*, 58 COL. L. REV. 143 (1958).

[32]J. CASNER & B. LEACH, CASES AND TEXTS ON PROPERTY 4 (2d ed. 1969) state that one of the tasks of the lawyer dealing with property is "to participate in the war against poverty" and "to share the aims of social workers."

ual conduct, it follows that the government should ensure that such conduct be regulated in a manner consistent with the demands and requirements of the general public.[33]

However, these comments on Reich's analysis warrant only a qualification, and not a rejection, of his basic thesis. They do not detract from the relevance of his central political endeavor to protect individual freedom within the bureaucratic structures of the burgeoning welfare state. But this concession to Reich's political objectives does not mean that his legal concept of the "new property" should receive full sanction; the legal question remains whether such an application of old property rules to modern forms of governmental largess is the most adequate response to this challenge posed by the welfare state to individual freedom. Against a broad application of traditional property rights to welfare claims, it may be argued that traditional property rules were designed specifically to deal with "movables" and "immovables," and that in many respects they simply do not seem applicable to welfare rights.

Moreover, in light of the need for flexibility by many welfare programs it may not be advisable to fit these programs into a legal straitjacket by applying a pre-determined body of mandatory rules. The functional overlapping of traditional property rights and welfare claims can possibly be legally recognized without a wholesale transfer of all property rules to all welfare claims. For the present, then, it seems prudent to discuss "property interests" and the "new property" from a perspective which recognizes not only that welfare claims and traditional property rights have certain aspects in common, but also that welfare benefits may require quite different treatment in certain areas.[34]

In this context it is appropriate to ask what difference it makes for the legal classification of welfare rights that, in principle, traditional property rights arise as the result of a person's individual effort, whereas welfare rights are not earned but instead stem from the taxpayer's

[33]The welfare recipient may prefer to sleep in a barn rather than inside a house, pointing to the living style of the pioneers; *see* Wilkie v. O'Connor, 261 App. Div. 373, 25 N.Y.S.2d 617 (1941). However, the welfare role assumed by society and accepted by the recipient makes it a legitimate demand upon his lifestyle to live in a way favorable to his health—an aim for which the welfare program was probably designed. The growing interdependence of men in modern society cannot be eliminated by legally pretending that it does not exist, either from a social or an individual viewpoint.

[34]One might argue from this perspective that the property analogy should be given up completely in favor of a separate body of welfare law which recognizes the notions behind the property parallel; a task to set up such a body of new rules might better be performed by the legislature than by the courts.

money. To begin with, such a flatly contrasting view of the rights' sources may not be fully consistent with the reasoning which has led the government to assume the welfare burden. A rigid view of the individual's autonomy from society, a view prevalent in the nineteenth century, is fundamentally inconsistent with the basic social attitudes which gave rise to the welfare state. The welfare state's acknowledgement of the interdependencies between the individual's fate and society's development leads us to deny the adequacy of a flat distinction between individual efforts and governmental largess, and this is not to mention the fact that traditional property rights are often not earned by strictly individual efforts alone.

But if the different origins of traditional property and welfare benefits as such do not justify a significantly different analytical treatment, are there other policy grounds against a full equation of the two groups of rights?[35] The old argument is relevant here that an individual (absent circumstances of health and age) is able and can be expected by society to rely upon his own resources in the long run; but an individual's claim to live his life in expectation of legally protected government support does not follow from our present concept of the welfare state. In fact, one of the basic notions upon which many welfare programs operate is that welfare assistance is for the purpose of helping an individual to live on his own resources in the future.

In addition, the fluctuation of the general needs of society as a whole provides an even stronger argument against an unqualified equation of welfare claims and traditional property rights. The feasibility and desirability of welfare programs depends upon a broad spectrum of economic, social, and political factors, none of which can be seen as constant elements. Changing needs of the nation's economy will always be a great factor in deciding the fate of welfare programs. Changing numbers of welfare recipients will also have a legitimate influence.[36] Thus, an unchanging and inflexible political philosophy behind welfare programs (which would follow from a full analogy with property) does not seem desirable. The close relationship of welfare programs to

[35] A clause for an automatic adaptation of welfare benefits to the general price index has so far been enacted not for general welfare benefits but only for disability insurance. *See* 42 U.S.C. § 415 (Supp. IV 1974). On the traditional scale, insurance rights are much closer to "rights" than welfare benefits, *see, e.g.*, Lynch v. United States, 292 U.S. 571 (1934); Note, *Judicial Review of Federal Administrative Decisions Concerning Gratuities*, 49 VA. L. REV. 313 (1963).

[36] Of course, such a limitation would not justify a violation of equal protection rights; inequal treatment of similarly situated persons cannot be supported by these considerations.

other broad social phenomena makes it imperative for the legal classification of welfare rights to remain susceptible to future revision.[37]

But before any conclusion is drawn from these observations on the property status of welfare rights, we must briefly turn to the doctrinal status of traditional property notions. On the one hand, it is certainly correct that there is a permanent core of property rights which is not subject to legislative change and which can therefore serve as a static basis for individual expectations. But this has never meant that all governmental measures limiting property rights will be considered illegal in the absence of compensation. We need only look to the modern development of zoning laws and various environmental regulations to see that even traditional property rights are subject to changing views of social needs.[38]

For our purposes, the essential point of this legal status of "old" property rights is that ranking welfare rights as constitutionally protected property will not result in a freezing of the development of welfare rights; for traditional doctrinal notions of property leave enough room for the accommodation of changing social and economic needs. Thus, the Supreme Court's rationale in *Dandridge v. Williams*[39] for giving

[37] *But see* Michelman, *The Supreme Court, 1968 Term; Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Michelman, *Constitutional Welfare Rights and "A Theory of Justice,"* in READING RAWLS 319 (D. Daniels ed. 1975).

[38] *See also* Sax, *Takings, Private Property and Public Rights*, 81 YALE L. J. 149 (1971).

[39] 397 U.S. 471 (1970). This case involved the constitutionality of a regulation issued under the Maryland Program for Aid to Families with Dependent Children (AFDC); the regulation had adopted a $250-per-month maximum grant scheme. Previous cases had established two classes of equal protection interests, those subject to state regulation if governed by the "rationale classification" standard and others which could only be regulated if there was a "compelling interest" to do so. In *Dandridge*, the Court was for the first time forced to classify welfare regulations in this new scheme. For our present purpose, the Court's decision was important in this way: if the Court chose to qualify welfare claims as "fundamental interests," this would have implied that the government was free to reduce a given welfare claim only if it could demonstrate a compelling interest for doing so. In practice, therefore, such a decision would have had a freezing effect on major parts of particular welfare systems. It would have been almost impossible, after such a decision, to persuade any court to uphold any large-scale reduction of a claim on the grounds of experimental or financial considerations. Citing decisions from an era before the new approach to equal protection, the Court effectively blocked the "property" analogy in this specific context by applying the "reasonable basis" standard.

The *Dandridge* Court noted that the administration of welfare as assistance "involves the most basic economic needs of impoverished human beings," but was not willing to set up a standard giving the federal courts a power to impose upon the States their views of what constitutes wise economic or social policy. 397 U.S. at 486–87. In other words, the Court's concern for flexibility of future approaches was

very limited constitutional weight to individual expectations of welfare benefits does not stand as a persuasive argument against the property status of such benefits. Welfare rights, it seems, may well be considered property rights which, in principle, are on the same constitutional level as traditional property rights, but which may require a wider degree of flexibility than the traditional property rights.

Finally, it must be asked what legal consequences are implied by our previous observation that welfare rights are necessarily coupled, albeit to a limited extent, with the generally increased role and responsibility of the welfare state. It is not hard to point out that such consequences must be conceded. If the government's policy behind a welfare program is to assist the recipient in finding a new job, then it is a legitimate demand upon the recipient to require him to cooperate with the employment office. Similarly, if the veteran's benefits are designed to provide resources for better education, it is reasonable to impose governmental conditions designed to limit benefits only to such persons who in fact make a substantive effort to improve their education.

But it is clear that the range of "non-property related" conditions which should be attached to welfare claims is not unlimited.[40] The simple fact that the state levies a tax upon a parcel of land has never been thought to justify a simultaneous attempt by the state to enforce pre-

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overriding. At the end of the decision, the Court explicitly distinguished the *Goldberg* case, finding that the imposition of procedural safeguards is quite different from second-guessing state officials in their responsibility to allocate limited welfare funds.

One year later, the Court was directly confronted with the legality of a change in welfare rights which reduced plaintiff's claim. Richardson v. Belcher, 404 U.S. 78 (1971). This time, plaintiff's social security disability benefits had been reduced substantially because of overlapping workmen's compensation payments. As could be expected, the Court relied on the *Dandridge* decision. It also quoted Flemming v. Nestor, 363 U.S. 603, 611 (1960) where it had been said that "a person covered by the Act has not such a right in benefit payments as would make every defeasance of 'accrued' interests violative of the Due Process Clause of the Fifth Amendment." Again, *Goldberg* was distinguished by limiting it to the procedural sphere. The Court noted in this context that "the analogy drawn in *Goldberg* between social welfare and 'property' cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits." 404 U.S. at 81. Both the *Dandridge* and the *Belcher* cases were cited approvingly in Ortwein v. Schwab, 410 U.S. 656, 659 (1973) when the Court stated again that welfare payments do not qualify as "fundamental interests."

[40]As to the doctrine of "unconstitutional conditions," see Brudno, *Fairness and Bureaucracy: The Demise of Procedural Due Process for Welfare Claimants*, 25 HASTINGS L.J. 813 (1974); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); O'Neill, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CAL. L. REV. 443 (1966); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

vailing moral views upon the owner. Given our view that the political functions of welfare benefits and traditional property rights are largely overlapping, it is difficult to perceive why the government should have a right to impose such views upon the welfare recipient, as long as policy considerations behind the welfare program do not themselves require such a condition. Several cases argued before the Supreme Court show the dangers to individual freedom and free institutions posed by a recognition of a more expansive governmental power.[41]

In modern conditions, the government cannot be conceived of as a commercial sort of private enterprise when it distributes benefits.[42] It may often seem tempting for the administrator to combine the granting of largess with unrelated objectives which perhaps the state could not easily achieve in the absence of a welfare program. But this temptation must be resisted, since its short-run advantages as perceived by the government cannot outweigh the insidious dangers to individual freedom inherent in such a policy.

In conclusion, our observations of the social role of the "new property" have shown that the various forms of government largess are in principle functionally comparable to traditional property rights. As to the specific form of largess with which this paper is concerned, it has been shown that welfare payments are, in this general perspective, a most typical form of governmental largess to which the notions of the "new property" are directly applicable. However, two major qualifications to this basic evaluation must be observed. First, the government must, with respect to all forms of largess, have the choice to change its policy within reasonable limits. Second, in the exercise of its largess functions, the government must remain sufficiently free to remain responsive to those social ideas which initially caused the government to assume the particular function.

## II. JUDICIAL DEVELOPMENT OF THE HEARING RIGHT: THE COURT'S ATTITUDE TOWARD THE "NEW PROPERTY"

It is not necessary to rely exclusively on an abstract notion of property in order to establish the case for a constitutional right to judicial

[41] *See, e.g.*, Carleson v. Remillard, 406 U.S. 598 (1972) (AFDC benefits cannot be stopped because of absence due to military service); Townsend v. Swank, 404 U.S. 282 (1971) (the mere fact of being a student does not rule out AFDC eligibility); King v. Smith, 392 U.S. 309 (1968) (morality of mother not relevant for children's benefit). *See also* Reich, *The New Property*, 73 YALE L. J. 733, 783 (1964).

[42] Stewart, *supra* note 7, at 1718.

review on welfare matters. The landmark case of *Goldberg v. Kelly*,[43] in which the Supreme Court equated welfare claims with traditional property interests for purposes of a hearing right, lends additional support.

This analysis of the judicial development of the hearing right, as decided in *Goldberg* and other cases, is founded upon the assumption that a successful comparative constitutional argument for a constitutional right to judicial review in welfare matters must be directed to three levels. First, it must be shown that a particular procedural character is not only common to both the hearing right and the right to judicial review, but also that this procedural factor played a prominent role within the *Goldberg* reasoning. Once this has been achieved, it appears at least *a priori* that the property rank of welfare claims should receive the same weight in the area of judicial review as it does in the hearing right area.

But we should be cautious to draw final conclusions from the procedural character alone: behind a necessary procedural similarity we may find functional considerations which have little in common. Therefore, on the second level, we must ask what the function of the hearing right (and the right to judicial review) really is. Finally, on the third level, it must be shown that the common procedural and functional character of the hearing right and the right to judicial review is also recognized on the constitutional level. This involves a demonstration that the two rights are centered around the same ideological notion, i.e., the property rank of the allegedly infringed right.

In order to understand the hearing in all these respects, it is helpful to consider briefly its historical development. For a long time, the right to a hearing was limited to those rights protected at common-law, i.e., to "liberty" and "property" as traditionally conceived.[44] Whenever the government acted outside this area, the distinction between "rights" and "privileges" served to limit the hearing requirement. The theoretical notion behind this distinction was fairly simple: government has affirmative duties toward its citizens only with regard to those rights flowing from the concepts of liberty and property.[45]

When government became active in a sphere where no common-law protected interests were at stake, the traditional procedural requirements were not applicable. It was believed that the state was in this area unbound by legal rules, unless there was a violation of established

[43]397 U.S. 254 (1970).

[44]*Cf.* Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193, 271–74 (1956).

[45]*See* Stewart, *supra* note 7, at 1718.

constitutional norms by specific conditions attached to the state's action. The underlying concept of the libertarian state was tied in with and gave support to this view. When the governmental foundations of this limited concept of the state's functions eroded, the limitation of the hearing right to only those interests protected at common-law was challenged before the courts.[46]

Even so, it took seven decades for the old distinction between rights and privileges to lose its full judicial support with regard to hearing rights.[47] After ten more years, the Supreme Court recognized a hearing right for welfare claimants[48] in *Goldberg v. Kelly*.[49] Finally, in *Roth v. Board of Regents*,[50] the Court gave up entirely, for hearing rights' purposes, the entire practice of distinguishing between "rights" and "privileges," thereby equating old and new property at least in the hearing area. Although it appears that a new version of the old distinction might be making a reappearance,[51] it is safe to say that individual hearing rights are now no longer controlled by such 19th century libertarian notions of the relationship between the state and the individual.

As to our first comparative issue, regarding the procedural nature of the hearing right and its relevance for the *Goldberg* rationale, it is instructive to notice that the Court in *Goldberg* had at least three doctrinal options to expand the range of interests triggering a constitutional hearing right.[52] First, it could have retained the accepted basic scheme, and simply broadened the notions of property and liberty[53]—

[46]For one of the earliest cases, see MacAuliffe v. Mayor, Etc., of City of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892).

[47]In Flemming v. Nestor, 363 U.S. 603 (1960), the Court declined for the first time to accept the "right-privilege" distinction.

[48]For a discussion of the special problems related to AFDC, which may have influenced the Court, see Mashaw, *supra* note 5, at 805.

[49]*See* Goldberg v. Kelly, 397 U.S. 254, 262 n. 8 (1970).

[50]408 U.S. 564 (1972).

[51]*See* note 64 *infra*.

[52]*See also The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 88 (1974).

[53]How difficult it is to define "property" and "liberty" becomes apparent even in the framework of the Court's positivistic approach. *See* Michelman, *supra* note 11. Although "liberty" and "property" are overlapping to some extent, the Court is willing to clearly distinguish them. *See* Goss v. Lopez, 419 U.S. 565 (1975). As to the construction of "property" in Arnett v. Kennedy, 416 U.S. 134 (1974). *See* Tribe, *Structural Due Process*, 10 HARV. CIV. R.—CIV. L. REV. 269, 277 (1975) [hereinafter cited as Tribe]; Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510, 1528 (1975); *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 86 (1974). In *Goss*, the Court found that a statutory grant of a right to schooling is cognizable as "property" under the due process clause. Goss v. Lopez, 419 U.S. 565, 574 (1974). *See also* Mashaw, *supra* note 5, at 805.

the reasoning of the majority in *Goldberg* corresponds to this model. Secondly, it could have, again relying on the accepted concepts of liberty and property, shifted the decision about the new definitions of liberty and property from a judicial judgment to one of the Congress;[54] this path was followed by adopting the "entitlement doctrine" in *Roth*[55] and later cases.[56]

*Roth* left open the question of whether the "entitlement doctrine" applied only to "property,"[57] or whether it defined the range of "liberty" protected by due process as well. On libertarian grounds, there was a strong argument to reject the latter version: defining the sphere of due process interests in terms of state law for both categories implied a potential abdication of the federal due process clause. An independent federal judicial interpretation of "liberty interests" would have guaranteed that the federal dimension of process remains alive. However, Justice Rehnquist's majority opinion in *Paul v. Davis*[58] casts doubt on the future adoption of this approach. In examining whether "reputation" is an interest of "liberty" rank, the opinion simply looks to an "alteration of legal status" on the level of state law and does not attempt to make an independent federal judgment.[59]

It is important to realize that these cases must be understood as a deliberate broadening of—or even departure from—the *Goldberg* method: nothing in the *Roth* or *Paul* cases would have made it impossible for the Court to exercise its own judgment on the concepts of

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[54]*But see* Hart, *supra* note 13, at 1394:

> Granting that the requirements of due process must vary with the circumstances, and allowing them all the flexibility that can conceivably be claimed, it still remains true that the Court is obliged, by the presupposition of its whole jurisdiction in this area to decide whether what has been done is consistent with due process—and not simply pass back the buck to an assertedly all-powerful and unimpeachable Congress.

[55]Roth v. Board of Regents, 408 U.S. 564 (1972). In this respect, a common line between the *Roth* and the *Dandridge* decisions can be drawn: the Court will not judge upon the substantive part of the new property, but limit the identification of "old" and "new" property to curtail Congress' ability to modify the procedural dimensions of the "new" property.

[56]*See, e.g.*, Paul v. Davis, 424 U.S. 693 (1976); Mathews v. Eldridge, 424 U.S. 319 (1976).

[57]Such a position could be based upon a view that "property" is one specific concept by which personal freedom is protected by the state, whereas "liberty" is the broader right embracing all forms of freedom, including those which the citizen has independently from state-enacted rules.

[58]424 U.S. 693 (1976).

[59]For a critical view of the opinion, *see The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 94 (1976).

liberty and property.[60] A similar option was to combine the Court's desire to move away from a *Goldberg*-type independent judicial judgment (possibly perceived by the Court as potentially explosive in the long run) and to construe a presumption for a hearing right whenever a legislative "entitlement" is created. Instead, the Court chose to retreat, at least for the time being, from an independent judicial interpretation of the Constitution by creating the *Roth* entitlement doctrine.[61]

The third alternative would have been the more radical approach: that is, the complete rejection of the liberty-property scheme as the basis for the hearing right in favor of an analysis based upon the importance of the matter to the individual concerned.[62] But again, such a concept would have demanded an active judicial role. Since this role would have been even broader than the one implied in the *Gold-*

[60]However, in Arnett v. Kennedy, 419 U.S. 134 (1974) and in North Georgia Finishing, Inc. v. Di-Chem, Inc., 49 U.S. 601 (1975), the Court construed the involved employee's and debtor's rights as "property interests" in a manner not fully consistent with an entirely positivistic approach. *See* Tribe, *supra* note 53, at 279. As to the construction of "liberty," see Note, *Entitlement, Enjoyment and Due Process*, 1974 DUKE L. J. 89, 96. *See also, supra* note 53.

[61]For a critical view of the entitlement doctrine, see Note, *Entitlement, Enjoyment, and Due Process*, 1974 DUKE L. J. 89, 111: "Carried to its logical extreme, the entitlement doctrine results in completely circular reasoning that contravenes the fourteenth amendment by allowing the *states* to determine that procedures are to be followed in dealings with their citizens without regard to federal standards." *Cf. The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 86 (1974).

[62]Such an approach is favored in Note, *Entitlement, Enjoyment, and Due Process*, 1974 DUKE L. J. 89, 119: the authors argue that the Court's opinions in this area are often rationalizations for judicial legislation. *See also The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 102 (1977); *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 88 (1974). But, of course, the proponents of such an approach must face the counter-argument that the constitutional text protects only "life, liberty, and property," and not "all human interests." Unless the judicial role is conceived as virtually borderless in the due process area, it appears preferable to use the constitutional text as an outer limit for the Court's freedom to interpret the clause.

In Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961), the Supreme Court stated: "Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." But the general language of the decision suggests that the traditional notion of property was still the framework of such a balancing test. *But see* Dixon v. Alabama State Bd. of Higher Educ., 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961). In Paul v. Davis, 424 U.S. 693, 701 (1976), the Court rejected an argument that "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."

*berg* decision—and apparently abandoned in *Roth*—it is not surprising that the Court did not choose to go this path.

Considering the choice of the Court from among these three options, the major concerns behind the Court's new direction are apparent. Most likely, the Court had become attentive to the implication of a judicial redefining of property and liberty and rejected such an independent judicial role in the adaptation of this scheme to accomplish fundamental social change.[63]

The Court has not revived the old "right/privilege" distinction, but adopted a more mechanical, legislatively-determined concept[64] in the substantive area. As long as examination under the applicable substantive rules shows that an entitlement exists, *Goldberg* and all subsequent decisions dictate that the individual has a right to a hearing.[65] However, *Goldberg, Roth* and *Paul* imply that the legislative role with respect to procedural aspects related to matters of welfare rights, and all forms of entitlement, is of limited scope. Thus, the legislature in

[63]*See* Stewart, *supra* note 7, at 1720 n. 255, and the dissents of Justices Douglas and Marshall in Ortwein v. Schwab, 410 U.S. 656, 661, 665 (1973); Brudno, *Fairness and Bureaucracy: The Demise of Procedural Due Process for Welfare Claimants*, 25 HASTINGS L. J. 813, 833 (1974); Michelman, *supra* note 11, at 19; Note, *Entitlement, Enjoyment and Due Process*, 1974 DUKE L. J. 89, 98.

[64]It is interesting to compare the Perry v. Sindermann, 408 U.S. 593 (1972), and the *Roth* case in this respect. Whereas the Court acknowledged a "property interest" in *Sindermann*, over the state's explicit disagreement, such an approach seems hardly consistent with *Roth*. In *Roth*, it seems that the justices disagreed on the question of whether the state meant to confer "property interests" on Roth, and not whether the given status should be judicially given a "property" rank.

Particularly after Paul v. Davis, 424 U.S. 693 (1976), it appears that state-enacted statutes have a crucial role in determining the sphere of due process. But, still, it is hard to imagine that the state statutes will be used to reduce the number of interests that have already been afforded the protection of the due process clause. As perceived by the Court, the role of the state statutes is to help it decide which interests shall receive this rank, in addition to the ones already protected. The present state of the doctrine is, therefore, that the Court is willing to expand the sphere of due process interests, but unwilling to determine itself which new interests shall be added to this sphere. In contrast, the former "right-privilege" distinction was based on a (more or less) static notion of property, and did not allow a legislative expansion. Under such circumstances, it seems hardly useful to state disapprovingly that the old doctrine has been revived. Both the old and the new concept of due process protects some interests and excludes others. No desirable constitutional scheme can include all interests. Therefore, the only real constitutional question concerns the method by which the borderline is drawn. Certainly, the new approach is different from the old one in this respect.

[65]Of course, this leaves open the question of the format and the timing of the hearing. A comparison of the language used in *Goldberg, Goss* and Mathews v. Eldridge, 424 U.S. 319 (1976) clearly illustrates the change in mood with respect to the conditions under which a hearing must be held.

this scheme determines the substantive claims which trigger the procedural right. But once that substantive decision is made, the legislature's influence on procedural rights becomes very limited. In this sense, the Court reveals a strong assertion of the judicial role for the determination of procedural matters.

Therefore, from a general perspective, it will be observed that the Court has split up the hearing right problem into two halves: the substantive and the procedural. Whereas the Court has retreated from an active role within the substantive part, its reasoning speaks for an independent exercise of judicial determination with regard to procedure. Yet one must not confuse the questions of the principal role assumed by the Court and the breadth of interests which the Court protected by its new scheme: for the present considerations, it shall be stressed that the Court decided on the data-triggering procedural rights, but not what those data were.

Of course, it is common legal knowledge—especially in the area of conflict of laws—that an analytical separation of a given right into a substantive and a procedural part is not always helpful and sometimes rather tends to distort the true nature of the right.[66] Procedural elements can be tied to substantive matters in a way that modifies the basic nature of the right, and one expert in the area of conflict of laws has described the substance-procedure distinction as "chameleon-like."[67]

The concepts of "substance" and "procedure" in themselves do not provide a strict dividing line. Whereas some matters will clearly fall under one of the two categories, others cannot be as easily qualified on the continuum lying in-between the more evident cases.[68] The constant debate on the procedural or substantive nature of a statute of limitations illustrates the potential difficulties.[69] But when Justice Rehnquist

[66]Considering the logic of the *Roth* rationale, a conspicuous weakness becomes apparent: the "substance-procedure" distinction to determine the sphere of interests triggering a claim to due process does not facilitate any answer to the second and equally important question as to what process is due in a particular case.

[67]R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 431 (1971).

[68]*See*, for matters of conflict of laws, Morgan, *Choice of Law Governing Proof*, 58 HARV. L. REV. 153, 195 (1944); Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L. J. 333, 344 (1933).

[69]R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 48 n. 55 (1971). For purposes of administrative law, one might be able, as in the field of conflict of laws, to establish functional criteria in order to distinguish issues within the grey zone. No such effort has been made by the Supreme Court.

It is true that in the areas formerly termed "privileges," there is a legitimate claim that the government does not unduly restrict the individual's liberty by attaching certain conditions to the benefit granted; but nowhere has it been claimed, as a legal proposition, that the government is under an obligation to take such

pointed to these problems of the *Roth* approach and voted to uphold the congressional scheme involved in *Arnett v. Kennedy*,[70] the majority of the Court explicitly disagreed.[71] It is hard to believe that this majority was not familiar with the severe difficulties in a virtually unqualified mandate to divide substantive and procedural aspects for the intended purpose. Rather, one is led to assume that this majority accepted these difficulties in order to achieve a different aim of overriding concern.

It has been suggested that the aim was to enforce "legislative candor."[72] But the flat notion behind this argument is that most people will look primarily to the substantive provisions and hardly take notice of procedural qualifications of substantive rights; therefore, the argument runs, procedural qualifications may have a tendency to unduly conceal what has actually been granted. But this perspective is, at best, ambiguous. Policy considerations may make it quite meaningful, under certain circumstances, to add procedural qualifications to newly created claims. Moreover, in order to force the legislature into a "candid role," such a tool would grant far too little leverage. Finally, it is a strange notion that it should be the Court's task to aim at "legislative candor"; such a basic effort to influence allegedly not quite "honest" legislative conduct may well rest better in the hands of the electorate.[73]

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measures. The *Dandridge* decision would not allow such a claim. Therefore, the government is free, for example, to grant certain benefits to families with at least two children, or it can also include families with only one child. When the legislature faces such a choice, its sovereignty empowers it also to make eligible, without restrictions, all families with two children, and to include families with one child, but with certain qualifications for the latter. Since the legislature has the choice to exclude families with one child, it would seem difficult to raise constitutional objections to a solution where these families are included with certain restrictions, as long as these restrictions are not in themselves unconstitutional. *See also, The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 86 (1975).

[70]416 U.S. 134 (1974).

[71]The authors of *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 87 (1974), agree with Justice Rehnquist, arguing that his position is a logical extension of the *Roth* holding. Bishop v. Wood, 96 S.Ct. 2074 (1976) has not overruled *Arnett*, Justice White's dissenting opinion notwithstanding. In *Arnett*, the applicable substantive federal regulation was interpreted to confer a "property interest"; in *Bishop*, the majority did not find that Marion's ordinance granted such a right. Given the majority's view of the substantive law, the holding in *Bishop* does not conflict with *Arnett*. *See also The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 100 n. 82 (1976).

[72]*The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 87 (1974). The authors of *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 104 n. 99 (1976) similarly argue that the government must take the "bitter with the sweet."

[73]One may argue that in many instances large parts of the electorate may not know of this "lack of candor." This would imply a shortcoming of the mass communication media. In this case, the Court could correct the legislature in specific

Behind the Court's remarkable effort to split up procedural and substantive aspects, one must assume a fundamental judicial concern that judges cannot be considered specialists in matters of substantive social policy, but, on the other hand, judges are qualified to assert their expertise in matters of a primarily "procedural" nature. The Court is not willing to yield to the Congress in what it perceives as "procedural" questions, even though it is well aware of the often considerable judicial influence upon substantive decisions of Congress.

Here the Court's historical experience may have been at work. Since the days of substantive due process, the Court has become highly reluctant to intervene in the substantive governmental regulation of business, and it would not be surprising if the Court saw parallel problems in assuming a role influencing other substantive matters. In this context, it is well to remember that the Court, in the equal-protection area, has mentioned economics and welfare in one phrase.[74] The Court may therefore have looked for a scheme which permitted it to stay out of largely substantive matters, but which still allowed the Court to retain a meaningful role.

The "substance-procedure" dichotomy easily accommodates these objectives. By explicitly refuting a judicial role with respect to "substance," the Court defended itself against possible criticism that it unduly interfered with congressional matters. Experience has shown that the Court can expect greater authority and acceptance when it is at least seemingly less concerned with substantive policy-making than with the traditional judicial sphere of adequate procedure. In addition, the very ambiguity of the substance-procedure dichotomy allowed the Court a standard by which it could later rationalize an expansion of the judicial role if necessary.

These speculations, however, should not distract us from the basic point: what the Court did was to expand the area of substantive interests triggering a claim to a hearing right. In *Roth*, the Court's analysis is centered around the existence of the hearing right, but the angle from which the Court argues centers around the importance of the substantive law in question. The significance of this aspect for the assertion of a constitutional right to judicial review of welfare claims is discussed in Part III.[75]

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instances, but the broader problem of an informed electorate would, of course, remain. The functioning of the basic political process cannot be solved by judicial means, and it remains doubtful whether specific judicial interventions into this basic process are not counter-productive in the long run.

[74] *Cf.* Dandridge v. Williams, 397 U.S. 471, 485 (1970).

[75] *See, infra*, at 546–63.

How do these discussions of the development of the hearing right by the Supreme Court reflect on a comparable constitutional right to judicial review in welfare matters? The contrast between the rationales of *Dandridge* and *Roth* throws some light on this question: the Court has no intention of interfering with substantive policy concerning welfare matters, but, on the procedural level, it is willing to equate welfare payments with traditional property rights.

With respect to our central question, the comparison of the treatment of the hearing right with the right to judicial review in welfare matters, this result is of strong weight. It establishes *a priori* that the common procedural nature of the two rights is itself relevant to our comparison. The Court has at no point indicated that specific procedural aspects applicable only to the hearing right have been controlling; to the contrary, the analysis of the hearing right decisions has revealed that the Court's actual concern was the broad constitutional issue of a procedural protection for a given welfare claim. Thus, on this level of consideration, the hearing right and the right to judicial review cannot be meaningfully separated: both are procedural mechanisms at the disposal of an individual aggrieved by a governmental measure. The reasonableness of a call for equal treatment of welfare matters in both contexts has, then, not only been upheld by this preliminary analysis, but it has been strengthened.

## III. SYSTEMATIC FUNCTIONS OF THE HEARING RIGHT AND THE RIGHT TO JUDICIAL REVIEW

Beyond noting their common procedural nature, we now turn to the functions which hearings and judicial review perform within the general system. Ultimately, the power of an argument for the extension of a constitutional right to judicial review, to be drawn on a comparison with the judicial expansion of hearing rights, will be much stronger if it is built not only on the common procedural nature of both rights, but also on a demonstrated functional similarity or complementarity within the constitutional scheme for the protection of rights granted by the legislature.

One caveat must, in the light of recent literature, be noted before any attempt to characterize "the" function of the hearing right or judicial review is made. The legal system cannot be compared with a machine, the parts of which are designed and function to fulfill one specific, exclusive purpose; legal institutions are set up to respond to complex social phenomena, and they may well contribute to promote social aims in a variety of fashions.

The traditional requirement of standing before a court, for example, has at least three functions: it enables the courts to operate effectively; it provides assurance that claims before a court are powerfully argued; and it may also be used to dismiss claims which are, from their nature, not susceptible to adjudication. One of these functions may be socially and legally less relevant than others, or may even be considered no more than a by-product; but that does not mean that it can be disregarded. In this sense, to look for "the" function of a hearing or "the" function of judicial review may be a dangerous mission. Ideally, there may be discovered one overriding function which carries more weight than the other given functions. If this is not possible, one must be willing to assess the significance of more than one function essential for the broader system.

### A. The Function of the Hearing Right

The right to a hearing, nowhere explicitly stated in the Constitution, has been deduced by the courts from the constitutional right not to be deprived of life, liberty or property without due process of law. Based on such a broadly conceived constitutional notion, the right to a hearing is necessarily subject to changing, constitutionally accepted considerations of contemporary social needs;[76] precedent and stare decisis may here not always enjoy their usual high rank in constitutional interpretation.[77]

In past decades it seems that at least three major doctrinal elements of the hearing right have been modified by the courts.[78] First, whereas formerly the common understanding was that only traditional property interests could trigger a claim of right to a hearing, this sphere of interests has been considerably expanded by the *Roth* ruling that each "entitlement" against the state is considered a property interest and therefore triggers a claim to a hearing right.

Second, given a property interest, a new balancing method to determine the existence and the scope of a hearing right has been judicially adopted. It is true that in the traditional approach functional considerations were also at work, but strongest emphasis was laid upon the

[76]Brudno, *Fairness and Bureaucracy: The Demise of Procedural Due Process for Welfare Claimants*, 25 HASTINGS L. J. 813, 817 (1974), contends that the Burger Court's opinions concerning the hearing right are hardly related to "constitutional doctrine," but are dictated by "policy wisdom."

[77]*Cf.* Tribe, *supra* note 53, at 293. Michelman, *supra* note 11, views due process as a legal recognition of changing moral values.

[78]For a traditional view of the function and the scope of a hearing, see 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.11 (1958).

distinction between facts particularly relevant to a case and facts which, while related, originated outside the given case.[79] Only when the former type of facts were in question would the right to a hearing be granted.

Historically developed by judicial decision,[80] this doctrine had widely become identified with Professor Davis' distinction between "legislative" and "adjudicative" facts,[81] as can still be found in some recent judicial opinions.[82] But this approach can certainly no longer be considered the only method, and it probably cannot even be considered completely correct. The courts have now developed a scheme oriented toward different factors.[83] Today the "entrance question" on the property nature of a disputed right is asked and, if the right falls under the expanded property notion, further "complementary factors" like appropriateness of a hearing right, the burden on the courts, and the gravity of the specific deprivation in question, will decide what process is due.[84]

Thirdly, related to this change, one can no longer speak of "one hearing right." The scope of the hearing right will in some cases still be, as formerly, the trial-type hearing, with the key elements of the right to present witnesses and the right to cross-examination. But in other cases, depending upon the "complementary factors," the right to a hearing may today amount to little more than the right to a very informal conversation between the concerned individual and the government official responsible for the action taken.[85] It seems, then, that

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[79]*See, e.g.*, Byse, *Opportunity to be Heard in License Issuance*, 101 U. PA. L. REV. 57 (1952).

[80]*See, e.g.*, Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 149 (1951) (Frankfurter, J., concurring). *But see* Market St. Ry. Co. v. Railroad Comm'n, 324 U.S. 548 (1945); Chicago & Northwestern Ry. Co. v. Railroad Comm'n, 156 Wis. 47, 145 N.W. 216 (1914).

[81]*See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.11 (1958).

[82]South East Chicago Comm'n v. HUD, 488 F.2d 1119, 1132 (7th Cir. 1973); Air Line Pilots Ass'n, Int'l v. CAB, 475 F.2d 900, 903 (D.C. Cir. 1973).

[83]*See, e.g.*, Roth v. Board of Regents, 408 U.S. 564 (1972).

[84]The Court stated that:

> More precisely, our prior decision indicates that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement could entail. Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

[85]*See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975); Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267 (1975).

the "true function" of the hearing right as conceived today may be best ascertained if one looks beyond these changes to find the constant elements of a hearing right.[86]

One function of the hearing right will always be to give to the individual the assurance that his case is not seen as an anonymous one, and that he has a right to have explained the reasons behind the administrator's decision.[87] This may be called the "pacifier function" of the hearing: in a therapeutic sense, it serves to make an individual feeling unduly aggrieved by a governmental measure aware of the legitimacy and the legality of the measure in question, and thereby contributes to the individual's feeling of receiving just treatment.[88] Such an approach is not incompatible with a second "political" function of a hearing, which is to integrate the individual's views into the administrative and political decision-making process. More specifically, the "political function" of the hearing can be seen in its channeling of individual viewpoints into the agency's policy considerations[89] and its practical effect of promoting individual participation in the governmental process.

A third aspect of the hearing right is its "symbolic" function. The hearing right is granted only to a certain category of interests—property and liberty—and denied in all other matters. This distinction serves in itself to emphasize the high rank which society attributes to these values. Thus, the individual is reassured of his rights and the administrator is alerted that particularly valuable interests are at stake.

But the "pacifier role," the "political function" and the "symbolic aspect" imply a scope of considerations much too limited and, at the

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[86]For a discussion of the functions of the hearing right, see, for example, Subrin & Dykstra, *supra* note 29, at 449. These authors value the "social order" and the "human dignity" function higher than this article does. They do not explicitly discuss the question of the function of the hearing right with respect to the substantive law in question. *See also* Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1511, 1540 (1975).

[87]The Supreme Court specifically mentioned this function in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951). *See also* Subrin & Dykstra, *supra* note 29, at 454; Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 89 HARV. L. REV. 1511, 1549 (1975).

[88]Tribe, *supra* note 53, at 269, argues that due process is relevant to "the structures through which policies are both formed and applied, and formed in the very process of being applied," supporting individualized hearings under less determinate standards. *See also* Tribe, *The Supreme Court, 1972 Term; Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

[89]The political function is stressed, in various ways, in Michelman, *supra* note 11, *passim*. Michelman argues that non-formal procedures—aiming at prudence or morality rather than strict legality—should in the future receive stronger emphasis; in his view, the *Roth* decision stands in the way of such a concept.

same time, too sweeping to give a full account of the dimensions generally attributed to the hearing right. In and of themselves, these factors carry no overwhelmingly stringent logic. The "pacifier function" is based on a notion that the legal process is generally so intricate that an individual untrained in law will have no understanding of it and suffer from Kafkaesque feelings unless he receives specific, individual attention from the administrator.[90] Whereas this may be true in single cases (for example, in the tax area), one is hardly justified in perceiving the entire legal system and its functioning in this perspective.

As to the "political function" of the hearing right, it is hard to give full support to a political theory which flatly contends that individuals will become alienated or that their interests will be disregarded if a right to a hearing is not granted. Basically, the right to participation in the political process has a much broader (and, in a sense, smaller) scope than the hearing right. The voting right, the right of free association, or the alternative to contact the elected representative may have much more political potential than a hearing right.[91] In principle, the democratic values dominant in our society tend to emphasize participation in the broad political process rather than the day-by-day conduct of government. Finally, to have the hearing right mainly for the sake of the "symbolic function" would certainly not be meaningless, but it would be a luxury found in no other part of the legal process.

For these reasons, the three previously mentioned functions of the hearing right cannot be considered as the central policy grounds behind this right. Equally important, such functions are not able to serve as a clue to explain the recent transformations of the hearing right. These functions cannot fully answer why the method to determine the sphere of a hearing right has been changed or why the substance of a granted hearing is changing. Therefore, while they may in specific cases have a strong explanative value,[92] these functions do not reach the heart of the hearing right.

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[90]But because the legal system has been moving in this direction, Subrin & Dykstra, *supra* note 29, at 478, are right in pointing out that the hearing right in today's society is probably more meaningful than ever before.

[91]This assumes that the elected officials—and not the bureaucracy—play the central political role or, at least, that elected officials will influence the bureaucracy's basic policies. *But see* Stewart, *supra* note 7, at 1808.

[92]The difficult issue distinguishing Londoner v. Denver, 210 U.S. 373 (1908) from Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915), can probably best be answered by relying upon, besides the matter of burden on the agency, the "political function." Where many citizens are concerned with the same problem, the political process can be relied upon much more heavily to correct an erroneous decision than in the case where only one person is involved.

It has been recently argued that "the one real function" of a hearing right is to facilitate judicial review by building a record on which judges can base their decisions.[93] If that were true, the question of this study would be answered, since *Goldberg* would then immediately lead to a claim of a right to judicial review for welfare claimants. However, the task to prove such a point certainly is not so easy as this approach would suggest.

Such an argument would not have been considered persuasive in the past. In the *Storer*[94] case, for example, the Supreme Court denied plaintiff a right to a hearing, but then found that plaintiff had a right to judicial review. However, it must be noted that modern decisions (most of them handed down in the Second Circuit) can be found in which the "review facilitating function" of the hearing is heavily emphasized. In *International Harvester Co. v. Ruckelshaus*,[95] for example, this was stated with reference to a rule:

> The procedures followed in this case, whether or not based on rulings that were 'mistaken' when made, have resulted in a record that leaves this court uncertain, at a minimum, whether the essentials of the intention of Congress were achieved. This requires a remand whereby the record as made will be supplemented by further proceedings.[96]

It might seem that this aspect of the hearing's function is limited to cases involving complex technological issues. But the potential scope of this modern approach certainly reaches beyond technological questions, and therefore it would not be surprising if this notion would, both in the rule-making and in the adjudicative context, gain increased strength in the future. Thus, while this novel function must be kept in mind, we shall, for our present purposes, not rely heavily upon it. For it remains to be seen whether the potentially broad scope of this function will in fact become generally accepted in the future and, as we shall later see, this notion has apparently played no key role in the recent judicial development of the hearing right.

If all these considerations cannot adequately explain the function of the hearing right, where is the clue? The easiest way to answer this

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[93]McCormack, *The Purpose of Due Process: Fair Hearing or Vehicle for Judicial Review?*, 52 TEX. L. REV. 1257 (1974). *See also* Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1511, 1549 n. 29 (1975).

[94]United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956).

[95]478 F.2d 615 (D.C. Cir. 1973).

[96]*Id.* at 649. *See also* Kennecott Copper Corp. v. EPA, 462 F.2d 846 (D.C. Cir. 1972); American Airlines, Inc. v. CAB, 359 F.2d 624 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966).

question is to recognize that the hearing right gives to the concerned individual a chance to influence the administrator's decision.[97] The Davis approach to the hearing right, with its strict emphasis on the specific "adjudicative" aspects of the individual case, remains correct inasmuch as it reflects this individual-serving function of the hearing. Indeed, it points to the most rational starting point, since it would be meaningless to give an individual a right to participate in the process and yet give him no chance to change that decision.[98]

But once this is accepted, it is no longer difficult to point to one basic function of the hearing right: it is related to an "enlightened" decision-making process. By an "enlightened decision" we mean in this context one which takes into account all those factors and circumstances which are favorable to the allegedly aggrieved individual. Since the correctness of the administrative decision depends upon the proper ascertainment of all relevant facts as well as the correct interpretation of the law, and since the concerned person is most likely to be best aware of all relevant facts and will possess the strongest incentive to detect erroneous applications of law against his interests, it is meaningful to allow this person to have an input in the decision-making process.

This aspect of the hearing right gains additional strength once one considers that, even if all facts are clear, the administrative decision will seldom follow automatically, since broad discretion is often given to the administrator.[99] To exercise his discretion in a proper way, the administrator will have to look beyond the individual concerned in the particular case; in many cases, the concerned person will be the only one able to point out necessary outside information relevant to the case.[100]

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[97]An attempt to emphasize the value of the hearing for the individual rather than the public is made in Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975). The authors argue that the Court's present balancing test focuses too strongly on public interests. *But see* Mathews v. Eldridge, 424 U.S. 319 (1976), where the Court emphasized the public interest *vis-à-vis* individual interests.

[98]A comparison of Goldberg v. Kelly, 397 U.S. 254 (1970), and Mathews v. Eldridge, 424 U.S. 319 (1976), illustrates that the individual's needs are of higher importance in the due process balancing process than the closeness of the right in question to traditional property rights.

[99]*See* K. DAVIS, DISCRETIONARY JUSTICE (1969).

[100]It has recently been suggested that the hearing right may not be the most effective nor the most economical means of achieving this purpose. *Cf.* M. BARTH, G. CARCAGNO & T. PALMER, TOWARD AN EFFECTIVE INCOME SUPPORT SYSTEM, PUBLIC PROSPECTS AND CHOICES 99 (1974); Mashaw, *supra* note 5. But since the courts have been reluctant to force the agencies into rule-making, and since the judicial enforcement of the management aspects seems to be no easy task, one must assume that this function of the hearing right will not lose strength in the near future.

But again, this does not provide an adequate explanation for the most dramatic change in the recent rulings of the Court with regard to the hearing right: the *Roth* notion that *any* entitlement triggers a claim to a hearing right. One might argue that *Roth* is not concerned with the function of the hearing, but only defines the circumstances which bring the hearing right into play. But this approach is too simplistic because it disregards the interdependence of the hearing and its objective. It does not tell us what considerations were behind the reasoning of the Court. It seems that these considerations must relate to the basic function of the hearing as perceived by the Court. The "enlightenment" aspect is, at least after *Roth*, hardly explanative for cases where the administrator has broad discretionary powers. An entitlement in the *Roth* sense will only be given if administrative discretion is not, or is only partially, existent; conversely, broad administrative discretion will not be construed as providing an entitlement.

Given the *Roth* holding, this means that a claim to entitlement will always be ruled out if there is a wide area of discretion. We must therefore conclude that an unqualified view of the hearing as a means of enlightenment is, at least today, not satisfactory: the need for enlightenment increases with the growing scope of administrative discretion. Moreover, it is evident that the Court was not concerned in *Roth* with the internal mechanism of the hearing right, but with the area of substantive law in which the hearing right becomes operative. Arguing only from the "enlightenment" perspective of the hearing, the main thrust of the Court's opinion remains obscure. More broadly speaking, if "enlightenment" is the central aspect of a hearing right, can this explain why a hearing right is granted for some substantively defined subject matter, but not for all such cases?

It seems clear that the traditional functional considerations can no longer be accepted without considerable qualification, for none of these concepts of the hearing right pay sufficient attention to the substantive-law related function. It is therefore argued here that the Court's strong efforts to expand the sphere of interests triggering a hearing right cannot be read but in a manner which attributes a strong, maybe the strongest, importance to the hearing as a means of securing the correct application of a certain limited body of substantive law.[101]

[101] *See also The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 85–86 (1974): Under the entitlement doctrine of *Roth*, the function of procedural due process is seen purely as protecting substantive rights of independent origin—that is, assuring that no one is arbitrarily deprived of a benefit to which the state has said he was entitled.

To support this view of the hearing right's function, one may at first simply point to the constitutional text. Due process is not granted for all rights, but only for those covered by the words "life, liberty and property." This is by no means a conclusive argument, but it shows initially that there is a certain connection between the hearing right and the substantive law applicable in a given case.

On a less abstract level, the substantive-law oriented function of a hearing right proves extremely helpful in explaining why the Court has in effect broken away from the traditional Davis concept. Davis assumed that a hearing is not adequate if the disputed matter in question is relevant for not only the concerned individual, but also to a wide segment of the public. Conceptually, as Davis himself points out, his approach has "fuzzy edges."[102] Under this analysis, the cases must be seen on a spectrum, with matters of only individual concern at one end and matters of exclusively public relevance at the other. Thus, a considerable number of critical cases lie in the grey zone for which the Davis approach suggests no clear solution.

Furthermore, there is no easy explanation to Davis' underlying assumption that, once a matter becomes legally relevant, the concerned individual shall not be given a chance to participate in its solution merely because he is not the only one who is concerned.[103] The administrative lawmaking process may well be facilitated in such a case by individual efforts; one could even say (in line with the "political-function" version) that, from the viewpoint of the public interest, the individual input into the process is even more relevant because the broad implications of the question will be best perceived by the administrators when they listen to a variety of informed viewpoints. Such a concept, of course, would not be valid under the assumption that questions of broader concern are always subject to legislative supervision and control and are therefore not really decided by the administrative process.

But the development of the relationship between Congress and the agencies, as illustrated by the development of the non-delegation doctrine, has gone in the opposite direction.[104] Individual efforts to enlighten the agency as to matters of broader scope can be considered a quite helpful contribution toward a sound administrative process in

[102]*See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.11 (1958).

[103]Subrin & Dykstra, *supra* note 29, at 460, suggest that no hearing is appropriate under these conditions because no one has been singled out for "harsh treatment."

[104]Stewart, *supra* note 7, at 1679. For a recent decision, see Amalgamated Meat Cutters v. Connally, 337 F.Supp. 737 (D.D.C. 1971).

light of the legislative purposes. For these reasons, the central part of the Davis approach has not entered our new formula for determining the existence and scope of a hearing right; though, in determining what process is "due," one will, as with the Davis approach, look to the individual's capability to make a meaningful contribution to the matter in question, but this will be done from a much different perspective.[105]

The Supreme Court's decision in *Carleson v. Yee Litt*[106] illustrates the movement away from the Davis notion. After the *Goldberg* decision, the state of California tried to give the case a restrictive interpretation by limiting the scope of the hearing right to the facts and excluding matters of policy. Such an approach, it appears, would be entirely consistent with the Davis concept. But the Supreme Court ruled it unconstitutional. The Court's reasoning relied largely on the grey-zone argument, stating that a distinction between fact and policy is unworkable. From the viewpoint of the "substantive law" approach as supported here, the Court's decision must be considered correct.

From these discussions, we may well conclude that the Davis concept of the hearing right can no longer be considered entirely correct. The substantive-law oriented version provides a much sharper focus upon the recent changes by the courts as well as the present structure of the hearing right. In conjunction with our initial property discussion, the latter concept easily explains why the courts have focused on the expansion of the interests which trigger a claim to a hearing right: because it is a basic function of the hearing to protect socially important interests, i.e., liberty and property. The courts had to redefine the perimeters of the hearing right at a time when the sphere of these interests had been expanded due to general changes in the structure of government and its relation to the citizens. Thus, we find additional

[105]Inasmuch as the new approach equates property with lack of discretion and rules out a hearing right where discretion is broad, Davis may point out that functional considerations are behind such a concept as well: in clearly discretionary cases, individual facts may be less relevant than the administrator's power to weigh these facts, and the hearing may therefore not be sufficiently determinative to be constitutionally required. But the Davis notion was not centered directly around the question of whether the hearing, if properly conducted and considered in the decision, could potentially rule out one decision and demand a different one.

[106]353 F. Supp. 996, *aff'd mem.* 412 U.S. 924 (1973). Plaintiff had filed the action to enjoin federal and state regulations allowing summary termination of welfare benefits prior to a hearing. Defendant argued that a prior hearing was not constitutionally required as long as no factual contentions were raised. The court found that the possibilities of mistake and misuse of the state's provisions in effect denied plaintiff the rights granted in *Goldberg*, arguing that "the state, even when using its best effort with seemingly innovative regulations, cannot operate the fact-policy system without many erroneous decisions." 353 F. Supp. at 1000.

support for our argument that the hearing primarily serves to secure the proper application of the substantive law in question.

We shall point out later that the mechanics of judicial review also serve to ensure that citizens are free from all governmental actions to which they have not (through their representatives) consented.[107] In this respect, it can be noted that the substantive-law oriented view of the hearing right reveals a structure parallel to judicial review. Thus, the hearing must today be seen as enforcing the legislative will.

In summary, the recent hearing right cases cannot be read to imply a full refutation of the hearing's "enlightenment" function (and the corresponding traditional focus on "adjudicative" facts). The hearing has been a mechanism for the benefit of a citizen feeling aggrieved by a governmental action, before and after *Goldberg*. But the recent cases have taught us that this "subjective" perspective does not reveal the complete functional structure of the hearing; it fails to explain central elements of the hearing right as now interpreted by the courts. We must today assume that the hearing also has a strong "objective" function which guarantees the proper administrative application of a certain body of substantive norms which society considers to have a basic importance (i.e., those affecting interests which fall under the contemporary category of property rights).

### B. The Function of the Right to Judicial Review

Again, it seems helpful to briefly consider the practical operation of judicial review in order to examine the manner in which judicial review serves the legal process.[108] For this purpose, we need not go into intricate and controversial details of the scope of the judicial review.[109] Rather, we can rely on the broad scheme set forth in sections 706 and 701 of the Administrative Procedure Act (APA). Although the APA is sometimes ambiguous, its basic features correctly reflect the accepted contemporary perspective of the role of judicial review.

According to section 706, "all relevant questions of law" will be examined by the courts. In light of the *Hearst* case,[110] one may add

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[107] *See infra* at 558–59.

[108] *See generally* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 576–94 (1965); K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 30.02–03 (1958); Stewart, *supra* note 7, at 2; McCormack, *The Purpose of Due Process: Fair Hearing or Vehicle for Judicial Review?*, 52 TEX. L. REV. 1257, 1258 (1974). As to the modern notion of review to ensure fair representation of all interests, *see* Stewart, *supra* note 7, at 1712.

[109] *See* the cases and discussions in L. JAFFE & N. NATHANSON, ADMINISTRATIVE LAW 362–484 (3d ed. 1968).

[110] NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944).

that judicial scrutiny has a wider scope in the area of clear statutory directives than the context of broadly phrased statutes and their application to specific cases. Even within the area of statutory directives, it seems plausible to give considerable weight to administrative decisions where the agency's particular expertise becomes relevant.[111] In the area of factual determination, the "substantive evidence" standard laid down in section 706 has been widely accepted, although the requirement of an independent judicial judgment on constitutionally relevant facts[112] will possibly receive greater emphasis in the future.[113]

In order to assess the systematic function of judicial review and compare it with that of the hearing right, the most appropriate starting point is the well-established principle that judicial review is a vital mechanism to guarantee enforcement of the rule of law. Thus, judicial review preserves the complex constitutional relations between the various governmental units and ensures that the individual is subject only to those governmental measures in compliance with law.

As to the preservation of the governmental structure, judicial review operates in a variety of fashions. Without judicial review, it would seem almost impossible to maintain the continued balance required by a federal system.[114] As to the separation of powers on the federal (and state) level itself, judicial review operates in two spheres. A court will first examine whether an agency has acted within its broad scope as determined by law; secondly, the court establishes whether the agency has observed the statutory directives of the specifically applicable law.

As to the relevance of this function of review and its preservation of governmental structures, it will certainly be observed that the seizure

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111 *See* the dissenting opinions in NLRB v. Highland Park Mfg. Co., 341 U.S. 322, 326, 327 (1951) (Douglas, Frankfurter, J. J., dissenting), and the concurring opinion in Board of Governors of Fed. Res. Sys. v. Agnew, 329 U.S. 441, 449 (1947) (Rutledge, J. concurring). *But see* Hart, *supra* note 13, at 1378: "If questions of law can be taken, I'll rethink *Marbury*."

112 *See* Crowell v. Benson, 285 U.S. 22 (1932); Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920).

113 *Cf.* W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 416 (6th ed. 1974).

114 As to the federal context, it may be noted that a parallel argument for due process rights and the right to judicial review has more strength in the case of federally enacted benefits than with those enacted by a state. *Cf.* Note, *Federal Judicial Review of State Practices*, 67 COL. L. REV. 84 (1967). On the other hand, a claim of a right under state law will generally suffice to show a deprivation of property in the due process context. *See* Note, *Entitlement, Enjoyment and Due Process*, 1974 DUKE L. J. 89, 98.

Should the Supreme Court continue its present trend to interpret the due process clause more narrowly than during the past five years, individual rights may well receive increasing attention on the state level. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

of steel mills by the executive and the states' regulation of nationwide distributed products typically pose harder problems than the administration of welfare programs. But problems relating to the observance of lines dividing the various governmental divisions are by no means absent in the welfare field. The sheer amount of money going into welfare programs makes it imperative that the Congress provide at least general guidelines which direct the proper use and distribution of the funds by non-elected administrators.[115]

As to the second aspect of the rule of law, the guarding of individual rights, it is worth noting the historical importance of this aspect for the systematic function of judicial review. Historical studies have shown that the origins of judicial review in England were more closely connected to individual protection than to governmental structure.[116] Nothing indicates that the basic scheme of judicial review was altered when it was adopted by the colonies.[117] There is clear evidence that in the 1780's courts were conceived "as instruments of the protection of individuals."[118] Also, the records of the Constitutional Convention of the state ratification debate, as well as the writings in *The Federalist*, allow no different conclusion.[119] Moreover, the Supreme Court has most clearly supported this view: ". . . under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of administrative power."[120] The major contemporary treatise reflects the same position.[121]

The "protection of the individual" function works in various directions. The basic notion is that the courts will ensure that the law is applied to the aggrieved person's case no less favorably than the legislature has prescribed.[122] Again, as with the hearing right, the contractual background of judicial review becomes thus apparent. But the

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[115]For the increasing federal role in welfare programs, see G. COOPER & P. DODYK, CASES AND MATERIALS ON INCOME MAINTENANCE (2d ed. 1973).

[116]*See* Jaffe & Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L. Q. 345 (1956).

[117]Jaffe, *The Right to Judicial Review*, 71 HARV. L. REV. 401, 417–18 (1958).

[118]P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEMS 6 n. 19 (2d ed. 1973).

[119]Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L. J. 498, 505 (1974); R. BERGER, CONGRESS v. THE SUPREME COURT 16–20 (1969).

[120]Stark v. Wickard, 321 U.S. 288, 310 (1944).

[121]*See* note 108 *supra*.

[122]*But see* Michelman, *supra* note 11, arguing that the individual is strongly interested in an honest response of the administrator, and that such honesty cannot be enforced by the courts.

function of judicial review is not restricted to the protection of the individual from unauthorized administrative measures. Due to the structure of the judicial system, judicial review also contributes to conformity in the application of the substantive law. Moreover, another major concern of the individual with respect to the law is thus promoted: only the existence of judicial review makes the application of the law highly predictable.

In summary, the "individual-protection" function of judicial review is to ensure the correct application of the statute by the agency in a specific case, thereby promoting conformity and predictability in the application of the law, without destroying the broad missions of the agency. In the contractual perspective, judicial review is to guarantee that the individual's freedom is not limited beyond what the people have agreed to. But in the more modern setting of governmental action, judicial review today serves to guarantee that the individual does not receive less than that share which society has allocated to him.

### C. The Functional Comparison on the "External" and the "Internal" Levels

With the background of this assessment of judicial review, we shall now ask how its functions relate to those of the hearing right. Do they allow the transfer of the *Roth* rationale in the context of judicial review? What are the parallel elements, where are the differences?

To facilitate this inquiry, we introduce a distinction which shall help to characterize those central aspects of judicial review and hearing which are related primarily to considerations of social policy from those which can be seen as less basic in a functional perspective. In this analysis, we shall therefore mean by "external" aspects those which are directly related to the operational conditions of the particular part of the government (in the broadest organizational sense), whereas the "internal" functions stand for the more substantive-oriented aims which judicial review and the hearing promote. Although "internal" and "external" aspects in this sense are interrelated, the distinction seems helpful for our present purpose of comparing the respective functions of the hearing and of judicial review.

On the "internal" functional level, the question is whether two mechanisms are comparable, and whether they are complementary in their structure and in the fashion by which they serve society, and in particular, the individual. To begin with the mentioned "secondary roles" of hearing and review, a considerable number of parallel elements can be traced. The "pacifier-notion" of the hearing right is certainly an important feature of any judicial dispute-settlement mech-

anism. Also, the symbolic aspect found for the hearing right plays a role in judicial review.

With respect to the "governmental-structure" function operative in judicial review, one may be inclined to attribute less importance to it in the area of the hearing right. But on reflection it becomes apparent that, given the "substantive-end" concern of the hearing and the amount of money going into welfare programs, it is not too hard to make a case that the hearing right does have a considerable power to preserve the governmental structure by ensuring that the will of the legislature is carried out. Concerning the "conformity" and "predictability" functions of review, this may not be such a strong concern within a hearing; however, the "substantive end" element of hearing emerging from the *Roth* decision may, again, lend itself to the argument that the hearing, in a minimal sense at least, has also to do with the even-handed application of the law. But this observation brings us already to the "principal functions" of the hearing and the review mechanisms, these principal "internal" functions being the vindication of individual rights and the proper application of the substantive law.

It is central for our present purpose to realize that both mechanisms are tailored to protect the individual.[123] The common systematic roots of judicial review and the hearing in contractual terms tie the two mechanisms strongly together in a comparative perspective of their social functions. Both can be invoked by the individual claiming that he has been treated unfavorably or illegally by the government; in both contexts the individual is given a tool to force the respective decision-maker administrator or judge to take a close look at the legislative will and find out whether the individual has been given his "share."

A few years ago, one might have been inclined to suggest that the hearing right is mainly aimed at the factual part of the case, whereas the court, in reviewing an agency's act, will mainly look to the proper construction and application of the law. But here the structural significance of the noted partial abandonment of the Davis approach becomes apparent; the acceptance of a broader notion, as illustrated in *Carleson v. Yee-Litt*,[124] makes such a differentiation largely meaningless. As to judicial review, the "substantive evidence" rule has never meant that the courts must close their eyes towards the factual issues; rather, the courts look at the facts but give considerable weight to the

[123]Pacific Far East Line v. Federal Maritime Bd., 275 F.2d 184, 186, *cert. denied*, 363 U.S. 827 (1959): "Administrative action that requires a hearing and turns on the meaning and application of statutory language is usually subject to judicial review."

[124]353 F. Supp. 996, *aff'd mem.*, 412 U.S. 924 (1973).

agency's judgment. (Even this approach does not stand on entirely secure constitutional grounds, since the revival of the *Crowell* and *Ben Avon* approaches would necessitate a change in this point.)[125] We can therefore conclude that, although judicial considerations of the facts will be less searching than the attention given to the facts in a hearing, it remains true in principle that both mechanisms serve the aggrieved individual and are related to both the factual and the legal aspects of the case.

With respect to the "external" level, different settings and techniques come into play due to the different phases of the lawmaking process which are constituted by the hearing and the appellate judicial review. The most obvious difference is that a review takes place on the judicial level, whereas the hearing is conducted by the administrative agency. A hearing does not involve the complicated machinery of the courts; it does not necessarily require legal counsel; it does not pose a burden on the courts; the financial implications for the concerned person are different; and the adversary character of judicial review is inherently stronger than that involved in a hearing.

From the viewpoint of the agency, it is important that, at the stage of a hearing, the agency can handle the matter without the immediate threat of judicial interference. Also, the court's perspective differs from that of agencies: whereas an agency, because of its purposes, tends to be public-oriented, a court is more concerned with private considerations.[126] Consistent with this different "external" setting, the specific interests of the individual are protected on the administrative level more by the enlightenment element, and on the judicial level more by the impartiality of the decision-maker.[127] Moreover, at the court level, the decision is secured not only by the narrow tools given by a hearing right, but also by the full spectrum provided by the court rules.

We can conclude, then, that both a hearing and judicial review are essentially mechanisms to protect the individual in different phases of the law-making process. Therefore, under different "external" conditions, these proceedings contribute to the same social aim.

We shall turn now to the second "principal function" of both mechanisms. Again, we find a functional identity on the "internal" level: the correct application of the substantive law in question. It has always

125W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 416 (6th ed. 1974).

126*See* K. DAVIS, ADMINISTRATIVE LAW CASES—TEXTS—PROBLEMS 16 (5th ed. 1973).

127As to the broader questions of impartiality on the administrative level, see Gibson v. Berryhill, 411 U.S. 564 (1973); Ward v. Village of Monroeville, 409 U.S. 57 (1972); Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959).

been clear that judicial review is a means toward this end. As to the hearing right, our earlier observations show that only after *Goldberg* and subsequent cases have we become aware that this end plays a prominent "internal" role in the functioning of the hearing right as well. Not surprisingly, the different stages of the lawmaking process require again that different tools be used to achieve a particular goal. In the area of the hearing right, the individual can point only to the substantive law, and hope that the administrator applies it correctly. In the area of review, one of the main tasks of the judge is to check precisely the correctness of the substantive law as applied by the administrator and, if necessary, to enforce a different legal interpretation of the relevant statute.

But one may question the value of these general observations in areas where the administrator has wide discretion. Some would argue that there is a significant difference in the roles of judicial review and hearing. Whereas the information-supplying function of the hearing becomes more important as the range of discretion grows wider, the role of judicial review becomes less defined when broad discretion is sanctioned, due to the lack of guiding standards. Although this is generally true, the property element of a welfare claim will necessarily narrow this functional difference. Not each welfare claim represents a property interest; only if the scope of administrative discretion is limited will a property rank be recognized. Therefore, there will exist neither a right to a hearing nor a right to judicial review in areas with an extraordinary range of administrative discretion.

But a further functional aspect common to judicial review and the hearing in discretionary areas is that both of these mechanisms serve indirectly to narrow the administrator's discretion. After a judicial decision has been made with respect to the exercise of discretion in a certain area, this ruling will be taken into account by administrators in cases with a similar setting. A parallel effect will result from the conduct of a hearing in which the law has been scrutinized by an administrative judge who has not taken part in the questioned administrative decision.

In summary, we can conclude that the two principal social functions of a hearing right and of judicial review of an administrative action are identical: both serve to secure individual justice and to ensure the proper application of the substantive law in question.[128] But whereas

[128]Byse, *Opportunity to Be Heard in License Issuance*, 101 U. PA. L. REV. 57, 58 (1952), has called the hearing right "an administrative counterpart" of a judicial trial.

these "internal" aspects are parallel, the same is not true for the "external" setting. The respective different stages in the law-making process require different techniques to ensure these common goals.

The relevance of this result to our assertion of a right to judicial review can now be established. For a predictable counter-argument against a substantive right to judicial review is that the availability of a hearing makes a right to review less imperative in the light of the identical "internal" functions of the two mechanisms. However, this objection loses any persuasive force when one points out that the techniques to reach these identical goals are geared to different procedural aspects and settings. In this sense, the two mechanisms are complementary; the availability of one does not make the existence of the other an unnecessary luxury within the legal process.

## IV. THE CONSTITUTIONAL BASIS OF THE HEARING RIGHT AND THE RIGHT TO JUDICIAL REVIEW

Before a final assessment of the full comparative argument can be made, we must turn to another comparative aspect: the constitutional bases of a right to judicial review and a right to a hearing. So far, our comparative inquiry has examined socio-economic factors and parallel functional features. But the constitutional level is of crucial significance for our question.

If the conditions triggering a constitutional right to judicial review do not coincide with those warranting a hearing right, we must assume that the constitutional issues involve aspects beyond those functional ones which we have examined. However, if these "triggering" conditions are identical, the combination of common functional and constitutional elements will leave no rational objection to the assertion that the *Goldberg* reasoning should be used as a foundation for confirming a constitutional right to judicial review in the welfare area. Since the basis of a hearing right in the protection of "property" by the due process clause is well-established, we can turn immediately to the more difficult question of the constitutional foundations of judicial review.

Traditionally, the breadth of the spectrum of matters subject to a constitutionally required judicial review has been discussed from two different angles. To invoke and analyze the "judicial power" was the dominant way to approach the problem; the approach less frequently used was to treat the question as a "due process" issue. But neither of these perspectives reached clear-cut answers. As to due process, the

argument was advanced that due process does not require a right to judicial review when "privileges" are at issue, but only when "rights" are involved.[129] This view, however, did not find general approval.[130] On the other hand, we shall see[131] that there is widespread agreement that the "judicial power" constitutionally implies the courts' jurisdiction to determine matters of liberty and property. Conceptually, the "due process" and the "judicial power" arguments were always held apart. Here it will be argued that such a bifurcation is without merit and should therefore be abandoned.[132]

As we have seen, judicial review cannot be totally separated from the protection of individual rights. In fact, a central function of judicial review is to vindicate the constitutional rights of citizens. Therefore, when such individual rights are in question, it is wholly inadequate to refer to the "judicial power" and, by virtue of this conceptual perspective, leave individual rights out of the discussion.

Of course, the concepts of judicial power and individual rights will not always overlap. For example, when environmental impacts on property rights are discussed, the substance of the arguments will not be related to "judicial power." But the two concepts necessarily overlap when the individual's right of access to the courts is in dispute.[133] This explains why judicial review must be granted with respect to the constitutionally protected property right and why, constitutionally, the question of review is left to the legislature where a right of lesser rank is involved. The concept of "property" ties together these two constitutional arguments regarding judicial power and individual rights in a fashion which does not allow a completely separate treatment of one or the other.

If one speculates why the courts have thus far been reluctant to transfer the *Goldberg* rationale to invalidate finality clauses, one may think of the times of judicial intervention into substantive legislative decisions. But an equally powerful motive for the courts may well be that considerations related to "judicial power," and not to "due process," are considered as the central issue which governs the question

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129*See* DAVIS, *supra* note 7, § 28.16, for further citations.

130L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 369, 381–83 (1965).

131*See, infra*, at 565.

132In dictum in Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir. 1948), the court stated that Congress cannot do by jurisdiction what it cannot do by substance. This seems to go in the same direction as our argument.

133*Cf.* Johnson v. Robison, 415 U.S. 361 (1974); Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964); J. MASHAW & R. MERRILL, INTRODUCTION TO THE AMERICAN PUBLIC LAW SYSTEM 854 (1975).

of a constitutional right of access to the courts. Therefore, it is important to emphasize that this distinction between the scope of the judicial power and the due process protection of individual rights is an artificial one as far as property is concerned: the two aspects are inextricably bound together where the protection of property through access to the courts is at stake.

The traditional emphasis on the "judicial power" argument has made it almost impossible, on the conceptual level, to transform changing social and political considerations in the area of judicial review; the requirements of a dynamic view of property law and the scope of the judicial power are conceptually too far apart to allow an interrelated perspective. This situation changes dramatically once the congruence of the "judicial power" and the "individual protection" arguments in the property area is clearly recognized and the two approaches are seen as interdependent concepts: the impact of changing property notions on the sphere of rights triggering a constitutional right to judicial review becomes obvious when this interrleationship is perceived.

Pursuing this point, we shall now look in greater detail to the sphere of interests for which an access to the courts is constitutionally guaranteed under traditional considerations. As to the due process argument for judicial review in the welfare area, there has so far been no ruling of the Supreme Court, at least up to *Ortwein v. Schwab*.[134] In that case, the Court had to decide about the constitutionality of a $25 filing fee to be paid in Oregon's appellate court when plaintiffs sought review of agency determinations which lowered their welfare payments.

In a 5-4 decision, the Court affirmed the decision of the Supreme Court of Oregon, upholding the fee requirement. All four dissenters (Brennan, Stewart, Douglas, and Marshall) contended that welfare rights should receive the same constitutional rank as marital rights and, therefore, the fee should be held unconstitutional on the equal-protection grounds stated in *Boddie v. Connecticut*.[135] In addition, Justices Douglas and Marshall thought that the majority's decision implied, *sub silentio*, a negative answer on the question of a due process right to judicial review[136] and therefore objected to the majority's de-

[134]410 U.S. 656 (1973). For a critical view of *Ortwein*, see Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1973 DUKE L. J. 1153. Michelman argues that the Court should not have looked to the particular interest at stake, but to the broader problem of a general right of access to the courts.

[135]401 U.S. 371 (1972).

[136]Ortwein v. Schwab, 410 U.S. 656, 662, 665 (1973) (Douglas, Marshall, J. J., dissenting).

cision on this ground as well. But it is highly doubtful whether the opinion of the majority should be read on such wide grounds. It would seem more plausible to interpret the opinion as saying that welfare rights do not enjoy the same rank as marital rights when the legislature requires a filing fee to be paid by an individual seeking review. Such a proposition would not imply a general denial of a due process right to judicial review; for the sphere of rights protected by the "compelling interest" rationale is by no means identical with those enjoying "property status."

In *Ortwein*, plaintiff did have access to the courts; the only question was whether the conditions attached to the right of review were constitutional. Douglas and Marshall held: (1) that there is a due process right to judicial review, and (2) that this right was violated when plaintiffs had to pay a $25 filing fee.[137] But, again, the majority opinion in *Ortwein* leaves open the question of a due process right to judicial review.

A different conclusion should be avoided particularly in the light of the explicit majority reasoning referring to *Kras*[138] and *Dandridge*,[139] but nowhere addressing the broader question of the constitutionality of a statute denying judicial review of welfare cases on all levels of the judicial system. It seems highly unlikely that the Court intended to solve the broad issue of a constitutional right to judicial review without stating so or even discussing the basic aspects of the issue. For these reasons, the due process argument for judicial review must be seen as unanswered by the Court now as before the *Ortwein* case.

It is also important to note that the decision in *United States v. Kras*[140] has no decisive bearing on our present question. In this case, the Court faced the question whether an indigent seeking to declare bankruptcy has a right of access to the courts. Even if one reads the majority opinion, which denied such a right, so broadly as to generally deny any right to judicial review for indigents,[141] this would not determine the constitutional right to judicial review in the welfare area. Our basic question here is whether the "property" interest in a welfare right, as conceded in *Goldberg*, must be carried over to the area of

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137 410 U.S. at 656. The majority opinion answers: "This Court has long recognized that, even in criminal cases, due process does not require a State to provide an appellate system."

138 United States v. Kras, 409 U.S. 434 (1973).

139 Dandridge v. Williams, 397 U.S. 471 (1970).

140 409 U.S. 434 (1973).

141 *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 57, 66 (1973).

judicial review. In *Goldberg*, an entitlement of the claimant against the state was involved; this was not true in *Kras*. Moreover, the expectancy element inherent in welfare claims[142] was certainly not present in the *Kras* setting.

Under a traditional "due process" analysis, no clear result has therefore been reached concerning the right to judicial review in the property area. We shall now examine the same question from the traditional viewpoint of "judicial power." From this perspective, there is much wider agreement than from the due process angle.

The Supreme Court has never squarely held that the judicial power covers all property interests. In the dictum of an older case, the Court stated: "To avoid misconstruction upon so grave a subject we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law."[143] Lower courts have often avoided the constitutional question by following this same statutory approach.[144] But among all the commentators discussing this issue, there is no indication that the jurisdiction of the courts can be generally curtailed where property interests are in question.

Professor Hart's starting point is that the Congress must take into account all provisions of the Constitution when it exerts its power to regulate the jurisdiction of the courts.[145] (In principle, this view is quite similar to the one advanced here: that the judicial power must be seen together with individual constitutional rights.) Consequently, Hart states that a regulation of the judicial jurisdiction must never defeat the purposes of individual rights. On these grounds, he concludes, Congress theoretically has the power to reduce all of the federal courts' jurisdiction, save the original jurisdiction of the Supreme Court. But Hart's qualifications of his basic view make this theoretical congressional power to remove property cases from the courts' jurisdiction virtually meaningless: once the Congress has granted jurisdiction, it may in Hart's view not exclude specific constitutional questions. Thus,

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142In *Roth*, the Court stated that it dealt with "those claims upon which people rely in their daily lives." 408 U.S. at 577.

143Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 284 (1856). This case was concerned with a private right; the Court later took a different view in *Crowell* with respect to public benefits. Crowell v. Benson, 285 U.S. 22 (1932). But our present purpose is only to establish constitutionally safeguarded protection of traditional property rights.

144Hart, *supra* note 13, at 1370.

145*Id.* at 1372. *See also* Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229, 268 (1973).

since this general jurisdiction has been granted, and property rights belong in the constitutional sphere, there must be, in Hart's view, a right to judicial review in property matters under the present system.[146]

Professor Jaffe reaches the same conclusion, in effect, when he argues that any administrative order which impairs liberty or property must always be subject to judicial review.[147] The reasoning behind this position, however, does not become entirely clear. Again, it is possible that a notion of congruence between the judicial power and individual rights lies behind this view. Jaffe's analysis seems also to be based on traditional principles of contract law; but as our discussion has shown, the contractual aim to preserve individual freedom must today encompass not only "movables and immovables" but the "new property" as well.

From a third viewpoint, Professor Eisenberg[148] argues that any substantive removal by the Congress of the courts' jurisdiction would endanger or even eradicate the constitutional scheme of separation of powers. Therefore, he reasons, such action would have to be held unconstitutional.

We may conclude, then, that under traditional standards there has been a constitutional right to judicial review whenever an individual's property rights were unduly infringed. But it is not necessary to base this argument on "judicial power" alone; rather, there should be an integrating of the considerations regarding the constitutionally required protection of individual rights and the constitutionally defined sphere of judicial power. From this it follows that, at least with respect to the issue of access to the courts, property interests are protected by the due process clause. This result is of central importance for our comparative argument. For since the hearing right is also an expression of the due process protection of property, we can now state that the question of a constitutional right to judicial review is conceptually related to those same issues decided in *Goldberg* with regard to the hearing right.

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[146]In Van Horne v. Hines, 122 F.2d 207 (D.C. Cir.), *cert. denied*, 314 U.S. 689 (1941), it was held that, because veteran's benefits are gratuities, the judicial jurisdiction over a decision of the administrator may be withdrawn. The language of the opinion suggests that this would not have been possible if property interests had been at stake. *See also* United States v. Babcock, 250 U.S. 328, 331 (1919): "[where] the United States . . . creates rights in individuals against itself, [it] is under no obligation to provide a remedy through the courts."

[147]JAFFE, *supra* note 11, at 386.

[148]Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L. J. 498 (1974); J. MASHAW & R. MERRILL, INTRODUCTION TO THE AMERICAN PUBLIC LAW SYSTEM 854 (1975).

## V. THE HEARING RIGHT AND THE RIGHT TO JUDICIAL REVIEW: A COMBINED PERSPECTIVE

It would seem that the major comparative issues have now been considered. But since these various issues have thus far been considered in isolation from one another, we must now assume a broader perspective that allows a conclusive determination of the constitutional right to judicial review. From a socio-economic viewpoint, our discussion has demonstrated that the equating of old and new property is fully in line with the traditional libertarian goal of preserving individual freedom.

As to the legal characteristics of judicial review and the hearing, we have found that they are not only both procedural mechanisms, but also that the Supreme Court in *Goldberg* and *Roth* placed heavy emphasis on the notion that the substantive legislative appropriation of welfare will be followed up by a procedural protection which corresponds to a property status. Further, we have seen that the principal "internal" functions of both the hearing right and judicial review are geared toward the securing of justice in the individual case and the more general scheme, toward the correct application of the substantive law at issue.

Finally, we have attempted to show that, as far as access to the courts in cases of allegedly violated property interests is concerned, the basic constitutional issue does not involve any substantial considerations beyond those with which our previous discussions have dealt. Both in the area of the hearing right and that of judicial review, the controlling factor is whether the interest in question qualifies as property right. Whereas all these aspects are parallel for the hearing right and judicial review, a cosmetic difference appears between the two because of the respective phases of the law-making process in which the hearing and judicial review are operative.

But we have seen that this "external" difference has no decisive bearing upon our question. The fact that different techniques are used to attain similar objectives can hardly militate against the recognition of a constitutional right to judicial review. These techniques are complementary rather than coinciding, and the recent developments in the hearing right area speak strongly for an extension of the *Goldberg* rationale to this complementary process of judicial review. In addition, we referred to *Johnson v. Robinson*[149] and the Court's strained efforts not to apply a finality clause in that case. The Court was indeed cor-

[149] 415 U.S. 361 (1974).

rect to state that constitutionally "serious questions" were involved, yet it struggled to interpret the finality clause so that judicial review was in effect granted.

But a future finality statute might be worded so explicitly that the Court will not be able to avoid the constitutional issue. On the basis of our examinations above, it is argued here that the Court should walk that "last mile" and, with reference to *Goldberg* and its progeny, declare that there is a constitutional right to judicial review in welfare matters; provided, that is, that considerations of a more practical nature do not stand in the way of such a determination.

## VI. PRACTICAL ASPECTS RELATING TO A CONSTITUTIONAL RIGHT TO JUDICIAL REVIEW OF WELFARE CLAIMS

It is worthwhile to question on both the individual and societal levels whether there is a practical need for judicial review of welfare claim determinations. In general, welfare programs tend to be characterized by a high degree of discretion by the Administrator,[150] and there seems to be a widespread feeling that such discretion is not always exercised in a manner consistent with either the legislative directives or the fair treatment of individuals.[151] Furthermore, if one takes into account the amount of money involved[152] and, correspondingly, the high number of welfare claimants concerned,[153] it seems hard to argue that the judiciary should be kept out of this field[154]. If judicial review is "a necessary condition of legitimate administrative power,"[155] it is time to legitimize that increasing power of welfare administrators.

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[150]*See* M. BARTH, G. CARCAGNO, & J. PALMER, TOWARD AN EFFECTIVE INCOME SUPPORT SYSTEM, PUBLIC PROSPECTS AND CHOICES 99 (1974); Handler, *Controlling Official Behavior in Welfare Administration*, 54 CAL. L. REV. 479 (1966); Book Review, 81 YALE L. J. 575, 590 (1972).

[151]If there is one thing to be learnt from our recent welfare history, it is that the power to administer is the power to destroy. Time and time again, the various levels of welfare bureaucracy—federal, state and local—have frustrated, for good or ill, the will of Congress and of reformers and reactionaries alike. J. HANDLER, REFORMING THE POOR 111 (1972). *See also* Stewart, *supra* note 7.

[152]*See* the figures in G. COOPER & P. DODYK, CASES AND MATERIALS ON INCOME MAINTENANCE 32 (2d ed. 1973).

[153]For the statistical data, see Mashaw, *supra* note 5, at 773 n. 8.

[154]Poverty has been called "the biggest domestic problem in our country." STATE DEPT. OF SOCIAL SERVICE, THE WHY OF PUBLIC WELFARE SYSTEMS, AN OUTLINE OF THE SOCIAL SERVICE SYSTEM IN NEW YORK. STATE 1 (1970), *quoted in* G. COOPER & P. DODYK, CASES AND MATERIALS ON INCOME MAINTENANCE 44 (2d ed. 1973).

[155]JAFFE, *supra* note 11, at 320.

From the welfare recipient's viewpoint, the claim of access to the courts is especially important since welfare recipients as a group are not well-organized and are therefore impotent in the majority-oriented political process.[156] Furthermore, from the recipients' perspective, it seems appropriate to stress, as the Supreme Court did in 1972 in the context for a hearing right, that the interest of the welfare recipient and that of society are not necessarily at odds, but are to a certain degree overlapping:

> [w]elfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to 'promote the general Welfare and secure the Blessings of Liberty to ourselves and our Posterity.'[157]

With respect to practical issues, we must also return to the issue of the "complementary" relationship between hearings and judicial review.[158] We have already seen that the techniques involved in hearing and judicial review are not identical. In the hearing context, the individual is restricted to persuade the administrator; before the courts, the technique of presentation is much more geared to definite issues and to the decision-making power of the independent judge. The hearing right is only of limited value[159] because, in spite of its doctrinally intended function to ensure justice, there is nothing to compel the administrator to determine the case before him in a logical or even a rational way.[160] In contrast, the judicial decision-making process leaves no room for administrative maneuvering.

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156*Cf.* Note, *The Poor and the Political Process: Equal Access to Lobbying*, 6 HARV. J. LEGIS. 369 (1969). *See also* Van Dyke, *Justice as Fairness for Groups?*, 69 AM. POL. SCI. REV. 607 (1975).

157Goldberg v. Kelly, 397 U.S. 254 (1970).

158In Silver v. New York Stock Exchange, 373 U.S. 341, 366 (1963), the Court noted: "[T]he affording of procedural safeguards, which by their nature serve to illuminate the underlying facts, in itself often operate to prevent erroneous decisions on the merits from occurring." Again, there is a lack of empirical data indicating the impact of hearings without judicial review, and vice versa.

159*See generally*, Stewart, *supra* note 7, at 1781; Mashaw, *supra* note 5, at 775: "there is a need for additional safeguards on the integrity of this very important segment of the administrative process." *See also* Note, *Entitlement, Enjoyment and Due Process*, 1974 DUKE L. J. 89, 116.

160The Burger Court has thus far not expanded procedural due process rights, but has instead given a narrow interpretation to the earlier opinions. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Brudno, *Fairness and Bureaucracy: The Demise of Procedural Due Process for Welfare Claimants*, 25 HASTINGS L. J. 813 (1974). It could be that one of the reasons for this development is a feeling by the Court that the resource implications,

Of course, one could argue that such an analysis underrates the practical function of the hearing, and that it is inadequate to reason that "maneuvering" is a normal administrative technique. But the very function of judicial review is to prevent arbitrariness and the abuse of power.[161] In this regard, no hearing right can be an appropriate substitute for judicial review. Moreover, the very possibility or threat of judicial review has a certain compelling power to prevent arbitrary actions.[162] Thus, the recognition of the property nature of welfare claims in the hearing area can be seen as only an initial step toward reaching the final aim.[163] Without an attendant right to judicial review, the right to a hearing remains a weak weapon to secure a fair and correct application of the substantive law.[164]

Finally, there is the inevitable argument that, as desirable as judicial review of welfare matters may be, such review would result in an intolerable burden upon the agencies and courts.[165] But the complexity

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as considered in the light of the overall value of a hearing, call for such a limited interpretation.

The skepticism of the Burger Court against any further expansion of procedural due process has again become apparent in the result and the language of Mathews v. Eldridge, 424 U.S. 319, 348 (1976): "The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decision making in all circumstances." The emphasis on the good faith judgment of the administrator in this case works in the same direction.

[161]What Stewart has written in a somewhat different context may apply here as well: "In many cases, the courts must exercise a check or it will not be exercised at all." Stewart, *supra* note 7, at 1808.

[162]JAFFE, *supra* note 11, at 325.

[163]Note, *Federal Judicial Review of State Welfare Practices*, 67 COL. L. REV. 84, 92 (1967).

[164]In 1966, Handler wrote:

> Whatever the injustice committed at the administrative level, the opportunity to go to court means that ultimately the rights of the individual will be secure against lawless administrative behavior. Of course, there have been instances where appellate courts have checked lawless administrative behavior; and it might be demonstrated that the availability of judicial review does have some impact on some administrative agencies. But, in the main, it seems doubtful to rely on reviewing courts to accomplish significant changes in administrative behavior. First, much of the informal administrative process is not susceptible to judicial review. Second, at least in federal administrative law, the impact of the reviewing courts has been characterized as sporadic, clumsy, and largely ineffective. The courts have been concerned almost exclusively with matters of procedure; what the agencies *do* to people and their property is largely beyond judicial scrutiny, as long as procedural steps are properly taken or adequate 'findings' are made. Handler, *Controlling Official Behavior in Welfare Administration*, 54 CAL. L. REV. 479, 491 (1966).

[165]In a letter written in 1952 by the Administrator of Veteran's Affairs to the Subcommittee of the House Committee on Veteran's Affairs, two reasons were given to support a finality clause: to reduce the burdens for the agency and the courts, and to ensure an adequate and uniform application of the law. The letter is quoted

of welfare programs,[166] the widespread lack of familiarity with their specific provisions, the financial burden of a law suit, and the frequent reluctance among welfare claimants to make use of the judicial machinery will tend to limit this burden of the right to review.[167] Empirical evidence on this point is not extensive, but available data indicate that agencies tend to overestimate the burden arising out of welfare claimants' rights.[168] In reality, the amount of potential claims seems by no means high enough to support an argument for preclusion of judicial review.[169] Moreover, it is appropriate to again draw a parallel with the hearing right. When the Supreme Court expanded the hearing right into the area of the new property, it had certainly taken into account the considerable additional burden created for the agencies. But the Court obviously felt that the resource implications of its ruling did not outweigh the strength of its positive arguments.

In fact, the burden which the right of judicial review entails will not even approach that burden created by the expanded hearing right.[170] The right to judicial review will almost certainly be invoked less fre-

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in Johnson v. Robison, 415 U.S. 361 (1974). As to the latter argument, it is a rare notion of the legal process to assume that the courts' decisions will stand in the way of an "adequate and uniform" application of the law. In Brotherhood of Ry. & Steamship Clerks v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650, 671, (1965) the Court said, in a non-property context: "The Board's choice of its proposed ballot is not subject to judicial review, for it was to avoid the haggling and delays of litigation that such questions were left to the Board."

[166]It may well be said that welfare law is the most complex part of administrative law in the federal area. *See Memorandum of Department of Health, Education and Welfare, quoted in* G. COOPER & P. DODYK, CASES AND MATERIALS ON INCOME MAINTENANCE 343 (2d ed. 1973).

[167]As to the limited use of the hearing right in practice, see Comment, *Texas Welfare Appeals: The Hidden Rights*, 46 TEX. L. REV. 223 (1967). The authors find that, among other factors, illiteracy, unassertiveness, and lack of understanding of rights stand in the way of a broad use of the hearing right; the situation will not be very different in matters of judicial review.

[168]In the area of social security disability, the administration was affirmed only in 162 out of the first 232 cases; the figures are quoted in Dixon, *The Welfare State and Mass Justice: A Warning from the Social Security Disability Program*, 1972 DUKE L. J. 681. Of course, disability claims may differ somewhat in this respect from welfare claims; but, still, the figures seem to be significant.

[169]After *Goldberg*, the New York Human Resources Administrator made strong allegations to the effect that the new right would be used "as a new hustle," and "smother the system in paper work." A subsequent study revealed that there was no evidence of increasing frivolous appeals; recipients prevailed in 49.4 percent of the hearings. *See* G. COOPER & P. DODYK, CASES AND MATERIALS ON INCOME MAINTENANCE 306 (2d ed. 1973). As to the general question concerning the value of such statistics, see Mathews v. Eldridge, 424 U.S. 319 (1976).

[170]As to the burden of the hearing right, see Mathews v. Eldridge, 424 U.S. 319 (1976).

quently than the right to a hearing; often, the hearing will clear questions of the claimant and, therefore, there will be no need for judicial review. Again, therefore, the parallel argument speaks for the right to judicial review. This is especially true if one recognizes that, in comparison with a hearing, judicial review affords a much greater guarantee of individual justice and adequate due process.

In conclusion, it appears that arguments of practicality are not pursuasive against our socio-economic and constitutional schemes in favor of a constitutional right to judicial review for welfare claims. The negative implications of a slightly increased judicial workload are easily offset by the social and political advantages afforded by an implementation of our proposed innovation.

## VII. THE SCOPE OF REVIEW REQUIRED BY THE ESTABLISHED SCHEME

Given our assertion of a constitutional right to judicial review in welfare matters, a note must be added on the scope of the review. The issue arises whether judicial review should be limited to the legality of the procedures employed to determine the welfare claim, or whether a traditional full-scale review is warranted. To address this issue, we must apply the comparative argument in a broader context.

If the relationship with and the comparison to the hearing constitutes the only viable method by which to establish a constitutional right to judicial review, then a limitation of the scope of judicial review to procedural aspects will almost necessarily follow. The hearing as a procedural mechanism does not transfer any power over the decision on the claim to a third party outside the administrative hierarchy. Therefore, on the basis of a comparative argument alone, it would not be plausible to argue for a scope of judicial review which goes beyond an examination of procedure and establishes the courts' power to rule on substantive issues in question.

But we must return to our initial remarks concerning the role of the comparative argument to the basic question of a constitutional right to judicial review. From the course of the arguments made, it becomes clear that this basic question is, on the constitutional level, primarily related to the property rank of the interest which the claimant pursues. Our constitutional analysis of the factors which have traditionally triggered a constitutional right to judicial review allows no different conclusion. Within this framework, the role of the comparative argument is to demonstrate that the changing notions of property which have been prompted by changes in the social and governmental struc-

ture have the same functional relevance for the right to judicial review as they did for the hearing right.

But in determining the required scope of judicial review of welfare claims, we are not obliged to draw primarily upon the established parallels between judicial review and hearing. Instead, we may take recourse to our basic argument that changing social and political structures require that, with respect to judicial review, the constitutionally controlling notion of property must be expanded so that welfare claims receive the same protection as traditional property enjoys. With this established, it becomes clear that a determination of the scope of judicial review of welfare claims must not be determined by a restrictive comparison to the structure of the hearing right.

Rather, our analysis must rely upon the protection which has been and is now afforded to traditional property rights. The required scope of judicial review must be essentially identical with that which has evolved over the decades with regard to conventional issues of property law. We can, therefore, simply refer to these traditional standards governing the scope of judicial review as being equally appropriate for welfare claims.